IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
	)	
vs.	)	**No. SC83745**
	)	
	)	
KENNETH BAUMRUK,	)	
	)	
Appellant.	)	

Appeal to the MISSOURI SUPREME COURT

From the Circuit Court of ST. LOUIS COUNTY

Twenty-First Judicial Circuit, The Honorable Mark D. Seigel, JUDGE

APPELLANT'S OPENING BRIEF

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Jurisdiction

Jurisdiction cannot be waived. Each court must independently assess whether it has jurisdiction. The 21st Circuit did not do so.

When the State filed its 18-count indictment in 1992, venue was moved to Macon County. There, after hearing copious evidence, Judge Belt found Ken permanently incompetent.[2] In February1998, this Court issued a writ of mandamus ordering Judge Belt to dismiss the 18-count indictment pursuant to §552.020.10(6),RSMo1994. Judge Belt complied.

St.Louis County prosecutors bypassed their obligation to appeal Judge Belt's judgment and refiled their 18-count indictment against Ken in St.Louis County. The Honorable Mark D. Seigel accepted the jury's first-degree murder verdict, and, although acting without jurisdiction, Judge Seigel vested this Court with exclusive appellate jurisdiction by sentencing Ken to death. Mo.Const.,Art.V,§3 (amended1982).

[2] For space and ease of reference, this will be used to mean "no substantial probability that [Ken] will be mentally fit to proceed in the reasonably foreseeable future." §552.020.10.6,RSMoCum.Supp.1991.

Facts

The 21st Circuit felt vulnerable (SuppL.F.309-311;AppendixA1-A3). In 1984, "judges and security officers [began] battling with county bureaucrats for more security." (VenueEx.A,§A2;AppendixA4-A6). "[The Circuit] proposed [to the County] a security plan designed to ensure judicial personnel, court employees and citizens…an environment free of illegally carried dangerous and deadly weapons." (SuppL.F.309-310;AppendixA1-A3). The two sides haggled over this for years, but decided nothing, prompting judges to joke "that nothing would be done until somebody gets killed." (VenueEx.A,§A-2;AppendixA5).

Circuit and County representatives met again on May 5,1992, to discuss security (VenueEx.A,§A-2;AppendixA4). While they convened, their Courthouse came alive, filling with employees, attorneys, litigants, witnesses, spectators and children (Tr.1659-1662,1695, 1698,1719-1721,1872-1874,1925,1946-1947,1955-1956,2052-2053,2068-2069,2078-2079,2094-2095;HammackTr.22-23,41-43).[3] Scores of people poured in from the streets around 7900 Carondelet and strolled through the lobby to the escalators and elevators in pursuit of justice. *Id.*;(Tr.2235,2239,2243,2257). The 2nd Floor bustled as Traffic, Misdemeanor and Family courts were called to order (Tr.1710,1894,2053).

[3] Transcripts by Hazelwood(Tr.); Hammack(HammackTr.); Lunatto(LunattoTr.).

At 10:10 a.m., about 12 police officers and nearly 40 St.Louis County citizens filled the 2nd Floor's main hallway (Tr.2053,2079,2095,2103). Some made small-talk, passing time until they were needed in court (Tr.1957,2069,2096). Suddenly, shots rang out. First, one; then another and another—six in all (Ex.8;Tr.1705-1708,1723-1725, 1877-1880,1929-1933,1948,1959,2055,2069,2079,2096;HammackTr.23). A cloud of smoke rose inside Division 38's courtroom (HammackTr.26). People fled, and panicked screams that "[h]e's shooting everybody" replaced the dull murmur of casual conversation in the main hallway (Tr.1960,2097;HammackTr.25).

Pandemonium filled the Courthouse (Tr.1708,2069;Hammack Tr.25,43). Officer Mudd began moving bystanders to the escalators (HammackTr.26). More and more people arriving for court streamed up the escalators (HammackTr.25-26). Mudd yelled at them, "[G]o back down." *Id.* Fleeing people crowded the "Up" and "Down" escalators (HammackTr.43). From the escalators, Mudd could also see the elevators, and he warned people "not to get off" (HammackTr.27).

Attorney Greg Luber pushed his client out of Division 38 and into the main hallway (Tr.1708). A bailiff was directing several bystanders to Division 33. *Id.* Luber headed that direction, stopping to help a woman pick-up her young child. *Id.*

Attorney Scott Pollard–father of 2, grandfather of 3–escaped Division 38, bleeding (Tr.1854,2069). He ran the to Division 35 (Tr.1883-1884). Attorneys and Division 35's

clerk noticed Pollard's wound and moved him to the judge's chambers (Tr.1884). He waited there for paramedics as shots echoed through the courthouse. *Id.*

Attorney Garry Seltzer—father of 2—darted out of Division 38, also bleeding (Tr. 1931-1932,1935). Seltzer followed the crowd to the escalators (Tr.1935). Reaching the 1st Floor, Seltzer took shelter in Judge Cohen's chambers, staying there until paramedics came and took him to the hospital (Tr.1935-1936).

Meanwhile, police officers who had been waiting to testify in various hearings, had scattered throughout the 2nd Floor:[4]

Officer Salamon—father of 4—went to Division 38, as did Officer Neske (Tr.1954,1959,2097). They saw Mary Baumruk "slumped back … bleeding" at counsel table (Tr.1960,2097). Salamon entered, crawling on the floor, his gun drawn (Tr.1960). People remained crouched among the pews awaiting escape. *Id.* They said, "He ran out the back door." (Tr.1961,2098). Salamon continued through Division 38, while Neske moved down and entered Division 36's courtroom (Tr.2097).

A 2nd Floor security officer radioed, "Get Clayton [police] here" (HammackTr.42).

Baumruk v. Baumruk

Mary and Ken Baumruk spent nearly twenty-one months fighting over the house they had shared for nearly fifteen years (Tr.1716,1815-1817,1855-1860). Ken had bought it before marrying Mary (Tr.1909). But, "That's the only thing [Mary] wanted

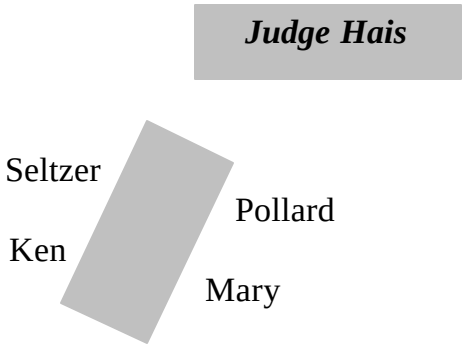
[4] A diagram of the 2nd Floor appears in the appendix (AppendixA7).

out of the divorce. Was the house." (HammackTr.72). Mary even got an *ex parte* order evicting Ken from his house, enraging him because he couldn't bear the thought of losing his family home (Tr.1815,1909;Ex.8;L.F.58;RefusedExs.A,B;AppendixA80-A92;*accord* VenueEx.A,§B-3). With a firm trial-setting, they converged on St.Louis County's Courthouse on May 5,1992 (Tr.1863,1923).

Upon arriving outside Division 38, Pollard met with Mary, his client (Tr.1873). He told her that he recently discovered that he had represented Ken around 1975, when Ken hired Pollard to modify the dissolution of his first marriage (Tr.1873; L.F.56-57). Had Pollard remembered this when Mary came to him in August 1990, he wouldn't have accepted representation of her because of the conflict (Tr.1871).

After talking to Mary, Pollard told Seltzer—Ken's attorney (Tr.1873). Then, Pollard and Seltzer met with Judge Hais in chambers (Tr.1874). The conflict "perturbed" Judge Hais (Tr.1891). He wanted to make a record in open court, and Seltzer left to tell Ken (Tr.1700,1874,1893). The case would proceed only if both Mary and Ken waived this conflict (Tr.1874;Ex.8).

Sandy Woolbright, a swing clerk "in this courthouse," prepared to tape-record the proceedings (Tr.1659,1664,1672). Mary, Pollard, Ken and Seltzer sat at counsel table, and Judge Hais entered:



(Ex.8;L.F.56;Tr.1874-1875,1927;VenueEx.A,§A-3). A handful of spectators sat in the gallery, including Mary's daughter, Lisa Bakker and Lisa's fiancé (Tr.1698,1721).

After Judge Hais administered the oath to Mary and Ken, Pollard examined Mary regarding the conflict (Ex.8;L.F.59). Pollard had represented Mary since "August of 1990" and Mary didn't know until that morning that Pollard had previously represented Ken (L.F.59). Mary wanted Pollard to remain her attorney (L.F.60).

Ken reached into his briefcase and retrieved two .38 special revolvers (Tr.1723-1724,1838-1843). As Pollard turned to ask Mary if she had "any objection or anything about [his] representation," Ken stood, held a gun straight out, point-blank and shot Mary in the neck, paralyzing her (Ex.8;[5]Tr.1677-1678,1705,1724-1725,1797,1878,1929). Terrified, Sandy Woolbright dove under her desk (Tr.1679). Ken turned toward Pollard, shooting him (Tr.1706,1879-1880,1931). Pollard felt heat penetrate his chest (Tr.1880). Ken then turned and shot Seltzer in the chest, and, when Seltzer turned to run, Ken shot him in the back (Tr.1706-1707,1931-1932). Seltzer hid behind the desk with Woolbright (Tr.1679-1680,1933). Ken walked around the table, put the gun near Mary's head and shot her again, killing her (Tr.1798,1804,1933).

Judge Hais slammed through the door behind his bench as Ken shot at and then pursued him (Tr.1679-1680,1707,1883,1933-1934,1949).

[5] The trial court, here, admitted Ex.8, and the State played it twice, over objection (Tr.1401-1403,1633-1634,1656-1657,1675-1676,2008;L.F.1038).

Hysteria overcame Lisa Bakker, and her fiancé pushed her out of the courtroom, took her down the escalator and out on the balcony (Tr.1721). Later, police took Lisa to "a judge's chambers" to take her statement (Tr.1728).

Sock-footed, Judge Hais ran out his courtroom's backdoor toward his chambers (Tr.1949). He fell. *Id.* Hearing gunfire, attorney Bruce Hilton looked down the hall (Tr.1947-1948). He saw Judge Hais fall, and quickly picked him up, put him in his chambers and closed the door (Tr.1949). Turning, Hilton was met by Ken pointing two guns at him (Tr.1949-1950). Ken seemed "[v]ery calm." (Tr.1950). Ken proceeded northward, and Hilton began calling to Judge Hais through the door (Tr.1952). Judge Hais didn't respond; he stayed in chambers sobbing for 20-25 minutes. *Id*.

At the end of the hall, two attorneys entered Division 36's clerk's office, saying, "The son of a bitch is shooting up…the whole courthouse…." (Tr.2056). Bailiff Nicolay pushed the clerk and two attorneys into Judge O'Toole's chambers (Tr.2056-2057). As he closed and locked the door, he felt Ken behind him. *Id.* Nicolay threw up his hands and said, "[C]alm down" (Tr.2057). Ken's face looked panicked or mad (Tr.2059). Ken told an elderly man sitting in the office to stay in his chair, then he shot Nicolay in the shoulder (Tr.2057-2060). Ken tried to open Judge O'Toole's door, getting angry when he couldn't (Tr.2059). Ken again pointed the guns at Nicolay, but, hearing a noise in the hall, ran out the door (Tr.2059-2060).

In the hall, Ken stepped around the corner and looked south down the east hallway (Tr.1965). Officer Salamon had entered the hall through the Division 38's backdoor (Tr.1961-1963). Ken shot at him (Tr.1967). Salamon dropped to the floor, ready to return fire, but he had no shot to return (Tr.1967).

Officer Neske had entered the east hall from Division 36 (Tr.2098). Ken was standing 10-12 feet away, looking down the hall (Tr.2099). Neske, too, glanced down the hall, but turned back toward Ken upon hearing a "pop" (Tr.2099).

Ken turned and walked westward across the north hall, stopping at the security elevator (Tr.2082-2084). Security Officer Whittier was there, and Ken put one gun to Whittier's stomach and one to his head (Tr.2084-2085). Ken asked where the elevator went, and Whittier explained that it just transports prisoners (Tr.2085). Ken seemed calm, but he ground his teeth for several seconds before retorting, "I don't want to go that way." (Tr.2085-2086). Ken continued west (Tr.2087).

As Ken approached the alcove near Division 35, he met attorney Tim Deveroux (Tr.2087,2070-2071). He asked Deveroux, "Who are you," and Deveroux replied that Ken was surrounded and should give up (Tr.2071-2072). Ken told Deveroux, "Get out of my way, I have no quarrel with you," and he continued down the hall. *Id.*

At the end of the hall, Ken turned south down the west hallway, stopping in front of Division 37 to reload (Tr.2073;L.F.673-674). James Hartwick,[6] an investigator for the

[6] Hartwick testified by deposition, at which counsel waived Ken's presence (L.F.665; Tr.2093).

St.Louis County Prosecutor, had entered the west hall south of Ken (L.F.670). Hartwick thought Ken might be a bailiff gone berserk (L.F.676). Hartwick entered the Adult Abuse Office and told the six women employees to get down and stay put (L.F.677-678).

When Hartwick looked back toward Ken, Ken was leveling a gun and shooting once at Hartwick (L.F.677). Ken was expressionless (L.F.678). Hartwick threw himself into the Adult Abuse Office, gathered himself, then glanced back into the hall (L.F.680). Ken was gone, apparently having stepped into Division 37's courtroom. *Id.* Hartwick went to a phone, but his attention was drawn back to the door—Ken fired a shot through the door window (L.F.681).

Ken walked east past stairs and elevators (HammackTr.27). Seeing Ken, Officer Mudd left his post at the escalators, warned the other officers that Ken was coming and took up a barricade position outside Division 38 (HammackTr.28). Ken entered the main hall near the escalators and turned toward Division 38 (HammackTr.29). He walked very fast, holding a gun in each hand (HammackTr.29). Mudd yelled, "Police," and someone else yelled, "Police; halt." (HammackTr.29). Ken shot twice, hitting Security Officer Dillon in the leg (HammackTr.44-45). Then, "all hell broke loose." (HammackTr.45).

Ken suffered 9 gunshot wounds, two to his head (HammackTr.54-59; Tr.1976, 2114; *State ex rel. Baumruk v. Belt,* 964 S.W.2d 443(Mo.banc1998);(AppendixA16-A26). Ken lay on his stomach, and Officer Neske cuffed his hands behind his back (Tr.1971,2108-2109). Ken asked Salamon and Neske, "Did I get her, did I kill her?" and "Did I kill the bitch?" (Tr.1973,2108-2109). An hour or so later, he told an ER doctor he had shot Mary because of the divorce (Tr.322-323;HammackTr.66).

The media described this as a "Rampage," "shooting spree" and "Mayhem" that "terrorized hundreds of people" (VenueEx.A,§§A-1,A-2,A-7). "[S]everal hundred" citizens filled the streets around their Courthouse (VenueEx.A,§§A-1,A-4). More people gazed down on the scene from their office windows (Tr.100). People compared the scene to a firefight in Vietnam (VenueEx.A,§A-1,*accord*VenueEx.A,§A-4). Dazed, people watched paramedics wheel Ken and his victims from the Courthouse to ambulances (Tr.100;VenueEx.A,§A-1).

The County immediately acceded to the Circuit's security concerns, doubling security guards and erecting metal detectors (VenueEx.A,§A-2;AppendixA4-A5). Years later, as citizens enter their Courthouse and pass through the metal detectors, they think about Ken (Tr.3,56);*accord State ex. rel. Baumruk v. Belt*, No.79861 (11/7/1997,Oral Argument). Ken is forever linked to the metal detectors (Tr.24,47,57,1082,1206,1208, 1275,1288,1319,1330,1366,1441,1493,2003).

The media used Ken's case to debate domestic violence, concealed weapons and divorce lawyers' fears (VenueEx.A,§§A-9,A-10,A-11). By 1998, the press had run over 160 stories, making Ken's "rampage" seem not so long ago (VenueEx.A;Tr.56). Indeed, roughly 70% of the County still remembers the "mayhem" and over 56% believes Ken is guilty (Tr.124-125, 127,137,141,170-171,1010-1011,1060,1069,1108-1109,1118,1146,

1201,1206,1208,1212, 1214,1216,1226,1228,1261,1269,1275,1278,1288,1310-1311, 1315,1317,1319,1322,1326,1329-1330,1356,1359,1412,1420,1426,1430,1434,1440, 1473, 1476,1479,1483-1484,1488,1491,1493;L.F.977-979). For example, the publicity left Juror Belding with "no question" whether Ken "did the shooting" (Tr.1270). Being human, Juror Belding agreed that his decision "could be influenced" by the publicity he'd heard (Tr.1273). Belding sat as the 12th juror on Ken's jury (Tr.1274-1275,1290-1291;L.F.983,1034-1035).

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Ken was taken to Barnes Hospital with multiple gunshot wounds, the most serious being the two to his head. Doctors rushed him to emergency brain surgery, removing bullets and brain-tissue (HammackTr.120-124;Tr.882-884;LunattoTr.105;DefEx.B-6). Two days later, he developed hydrocephalous (fluid on the brain) and doctors inserted a drain in his brain (HammackTr.124-130;Tr.885-888;L.Tr.12;DefExs.B-7,B-8). After three weeks of intensive care and around-the-clock security, Ken was arrested and transferred from Barnes to St.Louis Regional (DefExs.C,N;AppendixA27,A31-A35). Police booked him on 18 counts, including first-degree murder, 8 first-degree assaults and 9 ACAs (DefEx.N;AppendixA31-A35). A month later, still recovering in Regional, he told Nurse Williams that he had killed Mary and shot some lawyers (Tr.307,642).

That summer and fall, Ken received several summonses alleging his wrongdoing:

7/16/1992: Bakker intervened in Ken and Mary's divorce (SuppL.F.104)

7/20/1992: Ken received Bakker's wrongful death (SuppL.F.286-287)

9/10/1992: Interlocutory Order of Default in wrongful death case, being "duly summoned and thrice called" (SuppL.F.297)

9/16/1992: Ken received service of Nicolay's lawsuit[7] (SuppL.F.401)

9/30/1992: Ken received Seltzer's federal lawsuit (SuppL.F.343-350)

10/20/1992: $1,000,000 wrongful death default judgment mailed to Ken (SuppL.F.375-377)

10/21/1992: Bakker's Request for Admissions in divorce mailed to Ken (SuppL.F.109-111)

On November 9,1992, Ken answered Nicolay's interrogatories through an attorney (SuppL.F.422-426). Regarding witnesses to the shooting, he answered, "see police report." (SuppL.F.423). Sometime in Fall 1992, Inmate Harbor asked Ken why he'd shot "the lawyers," and Ken replied that Mary "was having sex with one of the lawyers and [they] were going to take all of his money." (Tr.310). In November1992, Jail Social Worker Buck noted that Ken "appear[ed] to have no insight into his criminal behavior." (DefEx.N;AppendixA37). Sometime before April 1993, Ken told Buck about the shooting (Tr.761).

[7] Judge Seigel tried Nicolay's lawsuit, finding punitive damages; and Bakker's garnishment case, accepting the wrongful death findings (Supp.L.F.265-266,484).

In early-1993, Ken won a change of venue to Macon County. *Belt,supra* at444. There, Judge Belt heard copious evidence that Ken's brain damage left him with dementia and amnesia regarding the charged offense (L.F.168). Judge Belt found that Ken couldn't understand the proceedings or assist counsel (L.F.168-169;AppendixA8-A12). Ken went to DMH, which initially disagreed with Judge Belt, but, after observing Ken for six months, concluded that he was permanently incompetent (L.F.171-172;AppendixA13-A15;Comp.Ex.F,at7).

The State hired Dr. Rabun to rebut DMH's conclusion (L.F.311). Judge Belt rejected Rabun's belief that Ken was fit to proceed and found him permanently incompetent (L.F.171-173,311). After much legal debate, this Court concluded that §552.020.10(6), RSMo1994, required dismissal and issued a writ of mandamus requiring the charges against Ken be dismissed. *Belt,supra* at446.

Judge Belt dismissed the 18-count indictment. The State didn't appeal, but immediately refiled its 18-count indictment in St.Louis County despite the dismissal (L.F.1,17-30). Judges Seigel and Cohen overruled counsel's repeated motions for changes of judge/venue (L.F.72-77,89-98,120-121,157-163,200,203-234,236-407,411-567;Tr.3-235,992-994,1030-1032,1502).[8]

The case proceeded for over eight months before Judge Seigel ordered a competency evaluation in December 1998 (L.F.124-126). The court hired Rabun to evaluate Ken, and, in 1999, Rabun opined that Ken suffered from permanent, post-

[8] Counsel waived Ken's presence at the August 3,1998 venue/judge hearing (Tr.3-6).

traumatic amnesia—a mental defect. (L.F.318-319;Tr.278). Noting that Ken could read, learn and recite new information, Rabun concluded that Ken was competent (L.F.318-319;Tr.281). Agreed that Ken's amnesia would interfere with his ability to testify,[9] Rabun concluded that Ken could assist counsel by reconstructing his case from discovery (L.F.322;Tr.281,288,290).

In May 2000, the St.Louis County prosecutors contacted Rabun and took him to witnesses to whom Ken had made statements about the charges (Tr.302,304,307,310,315-318,322-323). Rabun accepted these lay witnesses' opinions that Ken's statements came from memory, not acquired knowledge (Tr.448-449). Ken, however, was arrested on the 18 charges before making any of these statements (L.Tr.96,106). Rabun and Judge Seigel didn't consider the effect of learning before finding Ken competent (Tr.399-400;L.F.754-763).

The Trial

On May 4,2001, one hundred St.Louis County citizens filed into their Courthouse, through its metal detectors and up to Judge Seigel's courtroom (L.F.14, 970-995). There, they learned that twelve of them would be hearing *State v. Kenneth Baumruk*—the case

[9] Ken didn't testify in either phase. Jurors were cautioned not to consider that fact in deciding Ken's culpability (L.F.1002), but weren't told they couldn't consider it in deciding Ken's sentence (L.F.1012-1027). During penalty-phase closing, the State thrice highlighted Ken's failure to testify (Tr.2240,2241,2258).

causing the metal detectors[10] to be installed (Tr.1031,1082,1206,1208,1275,1288,1319, 1330,1366,1441,1493,2003). In voir dire, the State told these jurors only that it had charged Ken with shooting and killing Mary during a divorce proceeding in "this courthouse" (Tr.1010,1059,1108,1145,1200,1264,1310,1356,1411,1472). It successfully blocked counsel's effort to voir dire about the additional fact that Ken "also shot others"[11] (Tr.1225-1226,1256).

To prove Ken guilty of first-degree murder, however, the State developed this additional fact in great detail during guilt-phase (Tr.1651-1655,1677-1680,1705-1708,1723-1725,1877,1929-1933,1948,1959,1967). No one doubted that Ken had shot Mary. As Juror Belding noted there was "no question about that" (Tr.1270). Defense counsel didn't dispute the act, just Ken's mental state (Tr.2009-2017;AppendixA63-A71).

Ken's amnesia prevented a diminished capacity defense (Tr.2039-2040,2159-2161;L.F.70), so counsel tried to rebut deliberation by showing that Ken had become too enraged by the divorce and conflict to deliberate. The court, however, precluded cross-

[10] Later, the State reminded jurors, "We didn't have metal detectors here in 1992." (Tr.2003;AppendixA57).

[11] At the venue hearing, the court had told the mock-jurors that the State alleged that Ken "shot and killed [Mary]…and then attempted to kill or cause serious injury to eight other individuals in this courthouse." (Tr.13,18). With this additional fact, mock-juror Sinclair couldn't be fair (Tr.99-100).

examination of Pollard about his conflict, as irrelevant (Tr.1887-1889), and excluded documents from the divorce, as hearsay (Tr.1898-1908;RefusedExs.A,B). Having averted this evidence, the State told jurors that, though defense counsel seemed to imply that Ken got so angry during the 1½-year divorce that he was out-of-control, but "you heard no evidence of that" (Tr.2018;AppendixA72) and "if there was [such evidence], you would have heard it." (Tr.2021;AppendixA75).

The State further argued in guilt-phase that Ken "intended…to kill as many people as he could in St.Louis" and made a "coolly calculated attempt at mass murder" (Tr.2003, 2005,2023;AppendixA57,A59,A77). Reminding jurors of the "raw emotion each one of those witnesses had…who had to witness the carnage in Division 38," the State replayed Ex.8 (Tr. 1998,2008;AppendixA62). The jurors found Ken guilty of first-degree murder (L.F.1008).

In seeking death, the State relied on the additional fact that Ken "also shot others." It listed this as ten aggravators: that Ken killed Mary while attempting to kill more than one person (i.e., Pollard, Seltzer, Nicolay, Salamon, Neske, Dillon, Mudd and Hartwick); that he created a great risk of death to more than one person and that he planned to kill more than one person (L.F.14-5893-894,1015-1020;AppendixA93-A99). Its evidence developed this fact in great detail (Tr.2055,2069,2079,2096,2099;HammackTr.23,44-45;L.F.677-681).

To mitigate Ken's sentence, counsel presented evidence that a series of severe and enduring stressors had accumulated on Ken: Between 1988 and 1990, three parental-figures died (Tr.2160-2161;HammackTr.93-94,99-100). When his mother died in August

1990, Ken carried her ashes with him for several months before arranging her memorial (Tr.2160;HammackTr.100). Also, in August 1990, Mary hired Ken's former attorney to file for divorce and get an *ex parte* order evicting Ken from his house (Tr.1700,1857,1874,18931900,1909;HammackTr. 100-101;L.F.58-60;SuppL.F.14-16; RefusedExs.A,B;AppendixA80-A92). These "severe and enduring" stressors were "indicators of suicide," but the court refused to submit the "extreme mental or emotional disturbance" mitigator (L.F.1028,1040;Tr.2161,2227-2228;DefEx.D;AppendixA29,A99).

In arguing for a death-verdict, the State argued that Ken

- "came into this courthouse…prepared for battle to kill as many as he could possibly kill. That is what we are talking about and for that he deserves…death." (Tr.2235,*accord*Tr.2238,2239;AppendixA101,A104,A105);
- "He came into this courthouse, your courthouse, and he tried to inflict as much carnage, as much mayhem and as much murder as possible…." (Tr.2243;AppendixA109); and
- "You will send a message with your verdict, whatever it is. It will go out through the community when you go back to your friends, your family, your co-workers, your neighbors, And as citizens of the county you have to tell him…that for what he did in this courthouse, that you think he should face the ultimate punishment…." (Tr.2257;AppendixA123).

After nearly five hours of deliberations, jurors found each aggravator and recommended death (L.F.1008,1029;Tr.2264-2267). Judge Seigel sentenced Ken accordingly on June 18,2001 (L.F.1046-1047).

Points

I.

The trial court erred in trying Ken's case in the St.Louis County Courthouse—the murder scene because such ruling denied Ken due process, a fair, impartial, indifferent jury and subjected him to cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21,22(a). This Court must independently review the rare spectacle of St.Louis County trying Ken at the murder scene. St.Louis County employed a procedure 'inherently lacking in due process" and created far too great a risk that "prejudice, passion, excitement, and tyrannical power" would decide Ken's fate rather than the "calmness and solemnity" constitutionally required.

Irvin v. Dowd, 366 U.S. 717(1961);

*Sheppard v. Maxwell***,** 384 U.S. 333(1966);

Turner v. Louisiana, 379 U.S. 466(1965);

State v. Johns, 34 S.W.3d 93(Mo.banc2001);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21,22(a).

II.[12]

The trial court abused its discretion in refusing to move venue away from St.Louis County because such ruling denied Ken due process, a fair, impartial, indifferent jury and subjected him to cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. The media inundated St.Louis readers with copious stories about how Ken "terrorized hundreds of people" with a Vietnam-like attack on their Courthouse. The publicity forever linked Ken to the Courthouse's enhanced security. Juror Belding admitted that, being "human," there was a danger that his decision would be influenced by this publicity, and the State insured prejudice by repeatedly imploring jurors to protect "this courthouse, your courthouse."

Murphy v. Florida, 421 U.S. 794(1975);

Pennsylvania v. Ritchie, 480 U.S. 39(1987);

State v. Johns, 34 S.W.3d 93(Mo.banc2001);

State v. Deck, 994 S.W.2d 527(Mo.banc1999);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

[12] Presented alternatively to Point I.

III.

The trial court erred in refusing to disqualify all judges in the 21st Judicial Circuit because such ruling violated Ken's rights to due process, a fair trial before a fair/impartial arbiter and freedom from cruel/unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. Feeling vulnerable, the Circuit "proposed a security plan designed to ensure judicial personnel, court employees and citizens…an environment…free of illegally carried dangerous and deadly weapons…." A dispute with the County delayed implementation of a security plan, prompting jokes "that nothing would be done until somebody gets killed." On May 5, 1992, during another meeting about security, the Circuit's Courthouse suffered an attack "likened to a firefight in Vietnam." Refusing to disqualify the Circuit destroyed the "appearance of justice."

Tumey v. Ohio, 273 U.S. 510(1927);

Bracy v. Gramley, 520 U.S. 899(1997);

In re Murchison, 349 U.S. 133(1955);

Oregon v. Haas, 420 U.S. 714(1975);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

IV.[13]

The trial court abused its discretion in refusing to disqualify Judge Seigel because such ruling violated Ken's rights to due process, a fair trial before a fair/impartial arbiter and freedom from cruel/unusual punishment. U.S. Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. A reasonable person would see an appearance of impropriety and doubt Judge Seigel's impartiality given his extra-judicial information about Ken. In *Bakker, et al. v. Baumruk v. The Employee Savings Plan of McDonnell Douglas,* Judge Seigel learned through stipulated facts that Ken "intentionally shot and killed [Mary] without legal justification…[and] subsequently shot and wounded several other individuals in the Courthouse on this same date." From what he learned in *Nicolay v. Baumruk*, Judge Seigel found that Ken's "conduct was so outrageous, extremely intentional and certainly reflects reckless disregard to the rights of others, entitling [Nicolay to $25,000 punitive damages]." Judge Seigel—Ken's final sentencer—had prejudged Ken's culpability both for the charged murder and its accompanying aggravating circumstances.

State v. Lovelady, 691 S.W.2d 364(Mo.App.,W.D.1985);

State ex rel. McCulloch v. Drumm, 984 S.W.2d 555(Mo.App.,E.D.1999);

In re M__ and M__, 446 S.W.2d 508(Mo.App.,Spr.D.1969);

Spotts v. Spotts, 55 S.W.2d 977(Mo.1932)

[13] Presented alternatively to Point III.

U.S. Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21;

Rule2,Cannon3(E)(1).

V.

The trial court erred in entering judgment and sentence against Ken because such rulings violated Ken's rights to due process, freedom from cruel/unusual punishment, and freedom from bills of attainder. U.S.Const., Art.I,§10,Amends.V, VIII,XIV; Mo.Const.,Art.I,§§10,21. St.Louis County filed an 18-count indictment, charging Ken with murder, 8 assaults and 9 ACAs. The case was moved to Judge Belt in Macon County, and he found that Ken is permanently incompetent. Pursuant to this Court's mandate, Judge Belt dismissed the 18-count indictment. Since Judge Belt's dismissal was, by statute, with prejudice, no trial court had jurisdiction until a higher court authorized it. St.Louis County didn't appeal the dismissal, and collateral estoppel precluded it from simply refiling the dismissed charges in St.Louis County.

State ex rel. Baumruk v. Belt, 964 S.W.2d 443(Mo.banc1998);

State v. Moore, 952 S.W.2d 812(Mo.App.E.D.1997);

Kilbane v. Director of Dept. of Revenue, 544 S.W.2d 9(Mo.banc1976);

U.S.Const.,Art.I,§10,Amends.V,VIII,XIV;

Mo.Const.,Art.I,§§10,21;

§552.020,RSMo1994;

§552.020,RSMoCum.Supp.1997.

VI.

The trial court abused its discretion in precluding Ken from asking jurors whether they would be predisposed to vote for the death penalty since Ken not only shot and killed his wife but "he also shot others" because such ruling violated Ken's rights to due process, a fair trial, effective counsel, effective/reliable sentencing and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§2,10,18(a),19,21. The fact that Ken shot others in the courthouse carries a "substantial potential for disqualifying bias." Indeed, recalling this "critical fact," mock-juror Sinclair concluded that she couldn't give Ken a fair trial. Ken suffered a "real probability of prejudice" since the State emphasized during its guilt and penalty cases that Ken shot several people besides Mary and indeed planned "to kill as many of the people…as he could," noting that only "by the grace of God" were there no other fatalities. The presence of even one juror who would be biased by this critical fact creates a real probability of prejudice.

State v. Clark, 981 S.W.2d 143(Mo.banc1998);

Morgan v. Illinois, 504 U.S. 719(1992);

State v. Clark, 45 S.W.3d 501(Mo.App.,E.D.2001);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§2,10,18(a),19,21.

VII.

The trial court erred in finding Ken competent to proceed, in making him stand trial and in sentencing him because such rulings violated Ken's rights to due process, freedom from cruel/unusual punishment and not to be tried while incompetent. U.S.Const.,Amends.V,VIII,XIV; Mo.Const.,Art.I,§§10,21; §552.020, RSMo1994. Ken suffered two gunshot wounds to his head, the removal of "portions of his brain," hydrocephalus and insertion of tubes to drain fluid from his brain. He has Dementia due to Head Trauma and Post-traumatic Amnesia, making it impossible for him to assist in his defense or to testify on his behalf. Ken can, however, read, learn and recite. The State took Dr. Rabun to various witnesses to whom Ken made statements about having shot his wife, two attorneys, "another guy" and having shot at Judge Hais. Ignoring that Ken had received detailed information about the 18 criminal charges stemming from his "rampage" in the Courthouse before making those statements, Dr. Rabun simply adopted his prior opinion—rejected by Judge Belt—that Ken was competent because he "suspect[ed] malingering." Collateral estoppel precluded relitigation of this issue.

State ex rel. Baumruk v. Belt, 964 S.W.2d 443(Mo.banc1998);

Drope v. Missouri, 420 U.S. 162(1975);

State ex rel. Sisco v. Buford, 559 S.W.2d 747(Mo.banc1978);

State v. Tilden, 988 S.W.2d 568(Mo.App.,W.D.1999);

U.S.Const.,Amends.V,VIII,XIV;

Mo.Const.,Art.I,§§10,21;

§552.020,RSMo1994.

VIII.

The trial court abused its discretion in refusing to strike Juror Belding for cause thereby depriving Ken of due process, a fair trial before a fair, "impartial, indifferent" jury, and subjecting him to cruel/unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. The publicity surrounding Ken's case left Belding with no question that Ken did the shooting. He *thought* he could acquit Ken if the State did not prove its case, but being human, he admitted there was a danger that his decision could be influenced by the publicity he had heard. Belding's presence on the jury created a real probability of injury to Ken.

Turner v. Louisiana, 379 U.S. 466(1965);

Patton v. U.S., 281 U.S. 276(1930);

State v. Feltrop, 803 S.W.2d 1(Mo.banc1991);

Woodson v. N.C., 428 U.S. 280(1977);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

IX.

The trial court plainly erred, resulting in manifest injustice, in not declaring a mistrial, *sua sponte,* during Prosecutor Waldemer's guilt and penalty arguments because such failures violated Ken's rights to due process, a fair trial before a fair/impartial jury and freedom from cruel/unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. Waldemer sought Ken's guilt and death by

1. **arguing that jurors "heard no evidence" that anger that brewed for 1½ years prevented Ken from deliberating—evidence Waldemer got excluded;**
2. **arousing jurors' hostility by reminding them, "We didn't have metal detectors here in 1992" and including them as victims of the attack on "this courthouse, *your* courthouse;"**
3. **inciting jurors to decide Ken's fate based on the case's "raw emotion;"**
4. **telling jurors their decision would reverberate "through the community" that expected a death verdict;**
5. **arguing Ken's failure to testify—"he doesn't care" and "has no remorse."**

State v. Weiss, 24 S.W.3d 198(Mo.App.,W.D.2000);

State v. Tiedt, 206 S.W.2d 524(Mo.banc1947);

DeLosSantos v. State, 918 S.W.2d 565(Tex.App.-San Antonio1996);

State v. Burnfin, 771 S.W.2d 908(Mo.App.,W.D.1989)

U.S.Const., Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),19,21;

§546.270;

Rule34-3.8,30.20;

I ABA Standards for Criminal Justice, Special Functions of the Trial Judge 6-1.1(2ed.1979)..

X.

The trial court plainly erred, resulting in manifest injustice, in admitting Investigator Hartwick's deposition *in lieu* of live-testimony because such ruling deprived Ken of face-to-face confrontation, due process and a fair trial and subjected him to cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII, XIV; Mo.Const.,Art.I, §§10,18(a),18(b), 21. To prove an aggravating circumstance, the State relied on the videotaped deposition of Hartwick, at which counsel purportedly waived Ken's presence. The right to confrontation, however, is personal to Ken, and *he* did not waive his presence.

Clemmons v. Delo, 124 F.3d 944(8th Cir.1997);

State v. Jackson, 495 S.W.2d 80(Mo.App.,K.C.D.1973);

Mattox v. U.S., 156 U.S. 237(1895);

Barber v. Page, 390 U.S. 719(1968);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I, §§10,18(a),18(b), 21;

Rule30.20.

XI.

The trial court plainly erred in letting counsel block Ken's presence at the August 3,1998 hearing without personally addressing Ken because such ruling violated Ken's rights to due process, be present throughout "criminal prosecutions," a fair trial and freedom from cruel/unusual punishment. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. Ken had a fundamental right to be present since his presence would have contributed to the hearing's fairness, and the trial court had a "serious and weighty responsibility" to elicit *from Ken* whether *he* knowingly, intelligently, and voluntarily waived his presence. If left uncorrected, this error will cause manifest injustice in that Ken's absence made it impossible for the court to assess the scope of prejudice in the jury-pool since some jurors could remember the event and Ken's face, but not his name.

Diaz v. U.S., 223 U.S. 442(1912);

Larson v. Tansy, 911 F.2d 392(10th Cir.1990);

State v. Sanders, 539 S.W.2d 458(Mo.App.,St.L.D.1976);

State v. Johns, 34 S.W.3d 93(Mo.banc2001);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21;

Rule30.20.

XII.

The trial court plainly erred, resulting in manifest injustice, in overruling counsel's repeated objections and letting the State present victim impact evidence during the guilt-phase because such rulings violated Ken's rights to due process, a fair trial before a fair/impartial jury, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. The State elicited that Pollard, Seltzer, and Salamon were each married with children and that Pollard had grandchildren; this proved no fact in issue, but simply prejudiced the jurors. After first preventing counsel from questioning the venire whether the fact that there were other victims would prejudice their verdict, the State then used the other victims and their family ties to encourage the jurors to base their verdict on emotion.

State v. Roberts, 948 S.W.2d 577(Mo.banc1997);

State v. Taylor, 944 S.W.2d 925(Mo.banc1997);

State v. Rousan, 961 S.W.2d 831(Mo.banc1998);

State v. Pointer, 887 S.W.2d 652(Mo.App.,W.D.1994);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21;

Rule30.20.

XIII.

The trial court abused its discretion in sustaining the State's hearsay objection and excluding RefusedExs.A,B from guilt because such rulings violated Ken's rights to due process, present a defense, a fair trial, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const., Art.I,§§10,18(a),21. RefusedExs.A,B were not hearsay. Counsel did not seek to use them to *prove* that Ken did *not* commit the acts of adult abuse that Mary had alleged or that the house on Deborah Street was Ken's separate property, but rather to rebut the State's case and to provide the jury evidence showing that Ken acted out of rage, not deliberation. Then, having won the exclusion of this evidence, the State thrice argued that the jury "*heard no evidence*" that Ken was so out-of-control he couldn't deliberate.

State v. Ray, 945 S.W.2d 462(Mo.App.,W.D.1997);

Crane v. Kentucky, 476 U.S. 683(1986);

State v. Samuels, 965 S.W.2d 913(Mo.App.,W.D.1998);

Gardner v. Florida, 430 U.S. 349(1977);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

XIV.

The trial court abused its discretion in sustaining the State's relevancy objection and unduly restricting counsel's cross-examination of Pollard regarding the conflict of interest because such ruling violated Ken's rights to due process, confrontation, present a defense, a fair trial, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. The State elicited from Pollard that he retrieved the file from Ken's previous divorce, felt "[t]otal shock" that he had represented Ken in that case, and that had he remembered representing Ken, he would not have accepted Mary's case. Since Ken shot Mary while Pollard was examining her about this conflict of interest, defense counsel wanted to confront the topic. As soon as counsel broached the conflict, however, the State objected that Pollard's conflict was irrelevant. Although counsel argued that a reasonable juror could infer that Ken was "incensed" that his former attorney was now working "on the other side" and thus anything Ken had told Pollard was now available to Mary. Precluding this inquiry prejudiced Ken in that it withheld evidence tending to refute deliberation.

Kentucky v. Stincer, 482 U.S. 730(1987);

Pointer v. Texas, 380 U.S. 400(1965);

Crane v. Kentucky, 476 U.S. 683(1986);

Arkansas v. Dean Foods Products Co., 605 F.2d 380(8th Cir.1979);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

XV.

The trial court abused its discretion in admitting Ex.8, over repeated objections that this audiotape of the murder caused undue prejudice, because such rulings violated Ken's rights to due process, a fair trial before a fair/impartial jury and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. While trying Ken at the murder scene, the State put the jurors in the middle of the shooting-spree. The prejudicial impact of twice playing Ex.8 far outweighed whatever tendency it had to prove a fact in issue. The tape lured the jurors' attention away from Ken's disputed mental state and invited them, as quasi-witnesses, to find him guilty based upon the "raw emotion."

People v. Blue, 724 N.E.2d 920(Ill.2000);

State v. Rousan, 961 S.W.2d 831(Mo.banc1998);

State v. Floyd, 360 S.W.2d 630(Mo.1962);

Thompson v. Oklahoma, 487 U.S. 815(1988);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

XVI.

The trial court erred in refusing Instruction No. A because such ruling violated Ken's rights to due process, present a defense, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I, §§10, 18(a),21. Paragraph 2 of Instruction A submitted that Ken was "under the influence of extreme mental or emotional disturbance" at the time of the murder. Counsel presented evidence that Ken had suffered a series of stressors in the months and years leading up to the murder. Given the cumulative effect of stress, Dr. Cuneo described Ken's stressors as "indicators of suicide."

State v. Nunn, 646 S.W.2d 55(Mo.banc1983);

Lockett v. Ohio, 438 U.S. 586(1978);

Chesire v. State, 568 So.2d 908(Fla.1990);

State v. White, 622 S.W.2d 939(Mo.banc1982);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

XVII.

The trial court plainly erred, resulting in manifest injustice, in giving Instruction No. 14 because it violated Ken's rights to due process and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VIII,XIV; Mo.Const.,Art.I, §§10,21. This instruction delineates ten aggravators, which, in reality, repeat one aggravator circumstance ten times. Such duplication does not narrow the class of defendants subject to execution, but gives the State an unfair advantage. The State told jurors to impose death because Instruction No. 14 is the "longest" instruction—"It's four pages long."

Zant v. Stephens, 462 U.S. 862(1983);

Servin v. State, 32 P.3d 1277(Nev.2001);

State v. Storey, 986 S.W.2d 462(Mo.banc1999);

State v. Ringo, 30 S.W.3d 811(Mo.banc2000);

U.S.Const.,Amends.V,VIII,XIV;

Mo.Const.,Art.I,§§10,21;

§§565.032,565.035,571.015,RSMo1986;

MAI-CR3d313.44A.

Argument

I.

The trial court erred in trying Ken's case in the St.Louis County Courthouse—*the murder scene* because such ruling denied Ken due process, a fair, impartial, indifferent jury and subjected him to cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21,22(a). This Court must independently review the rare spectacle of St.Louis County trying Ken *at the murder scene*. St.Louis County employed a procedure 'inherently lacking in due process" and created far too great a risk that "prejudice, passion, excitement, and tyrannical power" would decide Ken's fate rather than the "calmness and solemnity" constitutionally required.

> You will send a message with your verdict, whatever it is. It will go out through the community when you go back to your friends, your family, your co-workers, your neighbors. And *as citizens of the county you have to tell him* that for what he did … *he should know from you, the citizens of this county*, that *for what he did in* ***this courthouse***, that you think he should face the ultimate punishment….

(Tr.2257;*also*Tr.2235,2238,2239,2243;AppendixA123,*also*A101,A104,A105,A109) (added).

The question, here, is a novel one—can jurors be impartial, indifferent as they sit *at the murder scene* listening to the horrific crime. The answer must be "no." This

extraordinarily rare procedure created such a probability of prejudice that it wholly lacked due process.

Ken repeatedly moved for a change of venue to avoid the inherent prejudice of being tried *at the murder scene* (L.F.72,74-77,89-98,1030-1031;Tr.13-229,992-994, 1502). Initially, it *was* understood that Ken could not get a fair trial in St.Louis County, and his case was moved Macon County. That case, however, had to be dismissed. *State ex rel. Baumruk v. Belt*, 964 S.W.2d 443(Mo.banc1998).[14] The refiled charges stayed in St.Louis County, over vigorous objection – thereby denying Ken due process, a fair, impartial, indifferent jury and subjected him to cruel/unusual punishment.

Emotions ran high in St.Louis County. "[S]everal hundred people" swarmed the streets around their Courthouse (VenueEx.A,§§A-1,A-4). Learning that Ken had "terrorized hundreds of people" in their Courthouse, the people mourned their lost innocence. (VenueEx.A,§A-1). Those who escaped the "[r]ampage," "likened [the shooting] to a firefight in Vietnam." *Id.*

From his office across the street, Juror[15] Holbrooke witnessed "all hell br[eak] loose." (Tr.1019). Police cordoned off the entire area, preventing Holbrooke from going to lunch. *Id.* Instead, Holbrooke and his coworkers hovered around their windows, gazing down on their Courthouse. *Id.*

[14] This opinion appears in the Appendix (AppendixA16-A26).

[15] Juror = one summoned for trial. Venireperson = one summoned for venue hearing.

Ken's case dominated St.Louis news (VenueEx.A). Indeed, Venireperson Mueller "thought about" Ken as he entered his Courthouse and passed through the metal detectors (Tr.3,56).[16] Suddenly, Ken's rampage didn't seem that long ago (Tr.56). Likewise, Venireperson Sinclair still sees the horrible images of bodies being brought "out of the courthouse" on stretchers (Tr.100).

"[N]o one [can] be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.'" *Sheppard v. Maxwell*, 384 U.S. 333,350 (1966)(quotation omitted). Criminal trials must be conducted in "calmness and solemnity." *Id*.(citation omitted). On rare occasions, the State employs a procedure so consumed by "the probability that prejudice will result that it is deemed inherently lacking in due process." *Id., quoting Estes v. Texas*, 381 U.S. 532,542-543(1965)(both involving a media circus inside the courtroom); *Irvin v. Dowd*, 366 U.S. 717,723(1961) ("wave of public passion" created by massive pretrial publicity); *Turner v. Louisiana*, 379 U.S. 466(1965)(sustained contact between the state's key witnesses and the jury).

Holding Ken's murder trial *at the murder scene* is a rare procedure inherently lacking due process. With his life at stake, Ken should have been tried elsewhere. *Id.* The trial court's error in trying Ken *at the murder scene* is a mixed question of law and fact. *Irvin,supra*. This Court must review *de novo* and independently evaluate the circumstances of Ken's trial. *Id.; Sheppard*, 384 U.S. at362.

[16] "Nothing had been mentioned about the type of case or anything." (Tr.20)

No Missouri case has addressed this extraordinarily rare procedure. Previous cases have addressed only whether *pretrial publicity* created a "wave of public passion," making a fair trial impossible. *E.g.*, *State v. Johns*, 34 S.W.3d 93,108(Mo.banc2001); *State v. Deck*, 994 S.W.2d 527(Mo.banc1999). *Johns* and *Deck* held that the *pretrial publicity* had not risen to the level of inherent prejudice found in *Irvin.* They don't help resolve whether trying Ken *at the murder scene* created too great a probability of prejudice for justice to endure.

Missouri guarantees its defendants a jury trial. Mo.Const.,Art.I,§22(a). But Missouri cannot simply provide *a* jury. It must provide a panel of "impartial, *indifferent* jurors." *Turner*, 379 U.S. at471-472(added). "This is true, regardless of the heinousness of the crime charged [or] the apparent guilt of the offender…." *Id.*

Turner presented a unique situation. There, two key state witnesses were deputies who also served as "shepherds" for the sequestered jury. 379 U.S.at467-468. The deputies swore that they had not talked to the jury about the case, thus no outward prejudice was shown. *Id.*at469. "[E]ven if it could be assumed that the deputies never did discuss the case directly with members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution." *Id.*at473. The potential for prejudice rendered Turner's trial "little more than a hollow formality." *Id.* After all, "[a]ny judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." *Id.*at472(quotation omitted). Turner's convictions and death sentence were reversed. *Id.*at474.

Ken's case presents a unique situation. The State tried Ken *at the murder scene*. His jurors entered the *murder scene* for voir dire, passing through metal detectors erected in reaction to Ken's "rampage" and using escalators, elevators or stairwells that the victims had used to escape the mayhem. Ken's jurors spent their days in continual association with the *murder scene*, which the State painstakingly transformed from a faceless piece of architecture into the face of a victim. "The proceedings [here—like *Irvin* and its progeny] were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Johns*, 34 S.W.3d at107, *quoting Murphy v. Florida*, 421 U.S. 794,799(1975).

The probability that this bizarre procedure created prejudice is too great for our system to endure. The jury serves as "an appendage" of the trial court. *Turner*, 379 U.S.at472. It must exercise "calm and informed judgment." *Id*. No citizen of St.Louis County could sit in their Courthouse and remain "indifferent." It would be blinking reality not to recognize the extraordinary prejudice inherent in trying Ken *at the murder scene*. "What happened in this case operated to subvert [the] basic guarantees of trial by jury." *Id.*at473. This Court must reverse Ken's conviction and death sentence and remand for trial in a different venue.

II. [17]

The trial court abused its discretion in refusing to move venue away from St.Louis County because such ruling denied Ken due process, a fair, impartial, indifferent jury and subjected him to cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. The media inundated St.Louis readers with copious stories about how Ken "terrorized hundreds of people" with a Vietnam-like attack on their Courthouse. The publicity forever linked Ken to the Courthouse's enhanced security. Juror Belding admitted that, being "human," there was a danger that his decision would be influenced by this publicity, and the State insured prejudice by repeatedly imploring jurors to protect "this courthouse, your courthouse."

Ken's case dominated St.Louis news (VenueEx.A).[18] The media did not simply report the facts; it stimulated the public's passions and prejudice with words like "mayhem" and "rampage" (VenueEx.A,§§A-1,A-2,A-4,A-7). It "likened [Ken's shootings] to a firefight in Vietnam" (VenueEx.A,§§A-1,A-4). Ken's case sparked debates on domestic violence and concealed weapons (VenueEx.A,§A-9,A-10,A-11).

[17] Presented alternatively to Point I.

[18] 70 stories on KSDK; 11 on KPLR; 9 on KTVI; 6 on KMOV; 2 on KDNL; and 41 in the *Post-Dispatch. Id.*

Dr. Warren's poll disclosed that even after six years, the tragic story of "mayhem" lingered in the minds of 71.5% of St.Louis County's citizens (Tr.157,163-164;L.F. 101,109). Citizens can still see Ken and his victims being wheeled out of their Courthouse on stretchers and still "th[ink] about" Ken as they enter their Courthouse (Tr.3,56,100). Ken's rampage doesn't seem that long ago to them (Tr.56).

Dr. Warren conducted his poll roughly three years before Ken's trial (Tr.124-125,127,137,141,170-171). Voir dire, however, validated Warren's polling—69% of the jurors remembered the attack on their Courthouse – 8 such jurors sat on Ken's jury:

- **Panel-1**: Urban, *Joyner*,[19] Brockelmeyer, Holbrooke, Burmeister, Evans, Boland (Tr.1010-1011)(7of10);
- **Panel-2**: *Johnson*, *Snodgrass*, Smith, Rosehill (Tr.1060,1069)(4of10);
- **Panel-3**: Rahn, *Williams*, Braden, Elliott, Elswick (Tr.1108-09,1118)(5of10);
- **Panel-4**: Richardson, Lizzo, Watts, Bauman, Fontaine, Schmidt, Bibb, Reiche (Tr.1146;L.F.977-979)(8of10);
- **Panel-5**: Bouiesledge, *Winingham*, *O'Connell*, Clark, Zimmerman, Patterson, Schultz, Parmley, McKamely (Tr.1201,1206,1208,1212,1214,1216,1226, 1228)(9of10);
- **Panel-6**: Penson, Killingsworth, Hagele, *Bean*, *Belding*, Kaiser (Tr.1261, 1269, 1275,1278,1288)(6of10);

[19] Emphasis denotes final jurors.

- **Panel-7**: Kaibel, Garbo, Mantych, Bauer, Garcia, Seim, Parker, Littmann, Coibion (Tr.1310-1311,1315,1317,1319,1322,1326,1329-1330)(9of10);
- **Panel-8**: Kwiatek, Woolsey, Williams, Byers, Davis, Buyat (Tr.1356,1359) (6of10);
- **Panel-9**: Macko, Henry, Stringfellow, Blackwell, Bradford, Jaedemann, Weis (Tr.1412,1420,1426,1430,1432,1434,1440)(7of10);
- **Panel-10:** Pritchett, Kish, Smith, Courtney, Bersett, Rose, Kinder, Pohlman (Tr.1473,1476,1479,1483,1484,1488,1491,1493)(8of10).

But, it was not simply that the publicity reached 70% of St.Louis County's citizens and galvanized the County. It was that Ken "had a gun *here* and shot some people" that disturbed the community (Tr.58,65,79)(added). Naïve, the County had let the security debate stagnate for years, leading judges to joke "that nothing would be done until somebody gets killed" (VenueEx.A,§A-2;AppendixA5). The horror of this attack on their Courthouse prompted immediate security measures—posting guards and erecting metal detectors (VenueEx.A,§A-2;AppendixA4-A5). Ken is forever linked to these enhancements (Tr.24,47,57,1082,1206,1208,1275,1288,1319,1330,1366,1441,1493, 2003)*; Cf*(L.F.80)(State requested hearing with mock-jurors to determine whether County associated Ken with the metal detectors).

As fully discussed in Point I,*supra*, the trial court overruled Ken's repeated requests for a change of venue (L.F.72,74-77,89-98,1030-1031;Tr.13-229,992-994,1502). That ruling denied Ken due process, a fair, impartial, indifferent jury and subjected him to cruel and unusual punishment. *If* this Court does not find inherent prejudice in

St.Louis County trying Ken *at the murder scene* (Point I,*supra*), it must consider whether Ken suffered actual prejudice. The trial court has broad discretion in deciding whether to move venue. *State v. Johns*, 34 S.W.3d 93(Mo.banc2001). This Court will find an abuse of discretion if "the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur there." *Id.*at107. While no case has apparently reversed under this standard, trial courts can't have unfettered discretion. *Pennsylvania v. Ritchie*, 480 U.S. 39,60(1987). A review of Ken's record begs the question—if his case doesn't warrant a change of venue, what case will?

As discussed above, 70% of St.Louis County's citizens remembered Ken's shoot-out at their Courthouse, including 8 of the 12 on Ken's jury. Of course, the question isn't whether jurors remember a case, but whether they have such fixed opinions about it that they cannot be indifferent. *Johns,supra* at107. Here, 56% of St.Louis County's citizens hold a strong opinion about Ken's guilt (Tr.162-163;L.F.102,111); *compare State v. Deck*, 994 S.W.2d 527(Mo.banc1999)(only 27% had strong opinion of guilt). The pervasive publicity in St.Louis County made Venireperson Smith doubt that Ken could be presumed innocent there (Tr.88). After all, this was *the murder scene.* As Prosecutor Waldemer put it, "[Ken] came into ***this courthouse***, ***your courthouse***, and he tried to inflict as much carnage, as much mayhem and as much murder as possible." (Tr.2243; AppendixA109)(added). Ken's actions became engraved in the minds of St.Louis County citizens. They remember his attack each time they pass through the metal detectors at their Courthouse.

Ken's jury was neither impartial nor indifferent. For example, Juror Belding would "do [his] best," but, being "human," he could be influenced by "things" in his head (Tr.1271,1290-1291;L.F.983). There "would be a danger" that his decision could be influenced by the publicity he'd heard because "[he's] human" (Tr.1273). This isn't indifference, and Belding should have been struck for cause. Nonetheless, he served over objection.[20]

Ken's case is nothing like *Murphy v. Florida,* 421 U.S. 794,799(1975). Murphy's 6-member jury included four jurors who viewed the pretrial publicity about Murphy's prior convictions as being irrelevant and another juror who believed prior offenders "are too often singled out for suspicion." *Id.*at800-801. Murphy tried to portray the remaining juror as being tainted by the publicity, but he could barely make a colorable claim. *Id.* at801. A "leading and hypothetical question, presupposing a [lengthy trial with no defense]," [the] juror conceded that his prior impression of [Murphy] would dispose him to convict." *Id.* But that juror also testified that he had *never* heard about Murphy or his case "until he arrived" for voir dire and heard other jurors discussing it. *Id.* Until Murphy's attorney told him, this juror did not know that Murphy was a "convicted jewel thief." *Id.* Finally, the juror noted that Murphy's murder conviction "of which he had *just heard*, would not be relevant" to this burglary case. *Id*.

[20] PointVIII,*infra*.

In contrast, here, Belding *knew from the publicity* that Ken had done the shooting—"there is *no question about that*." (Tr.1270)(added). Even Belding recognized the "danger" that his decision would be influenced by the publicity he'd heard.

Murphy noted that even that juror's impartiality "might be disregarded" if the atmosphere of Murphy's trial had been sufficiently inflammatory. *Id.*at802. Murphy, however, could only point to pretrial publicity that had ended seven months before his trial. *Id.* Ken points to much more. As fully discussed in Point I,*supra*, Ken stood trial *at the murder scene* – a fact the State wouldn't let jurors forget. Prosecutor Waldemer repeatedly referred to "this courthouse" and "your courthouse" to arouse the jurors' personal hostility toward Ken (Tr.2235,2243,*accord*Tr.2003,2023,2238,2239,2257; AppendixA101,A109,*accord*AppendixA57,A77,A104,A105,A123).

The jury deliberated for nearly five hours before deciding that Ken should be executed (Tr.2264,2267). Did the State's incendiary rhetoric imploring the jurors to protect their Courthouse and their community decide Ken's fate? Or was it Juror Belding's bias from the publicity he'd heard? Or was it the continual, intimate association between the jurors and *the murder scene*? If this case did not require a change of venue, then no case ever will. This Court must reverse Ken's conviction and death sentence and remand for a new trial in a new venue.

III.

The trial court erred in refusing to disqualify all judges in the 21st Judicial Circuit because such ruling violated Ken's rights to due process, a fair trial before a fair/impartial arbiter and freedom from cruel/unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. Feeling vulnerable, the Circuit "proposed a security plan designed to ensure judicial personnel, court employees and citizens…an environment…free of illegally carried dangerous and deadly weapons…." A dispute with the County delayed implementation of a security plan, prompting jokes "that nothing would be done until somebody gets killed." On May 5, 1992, during another meeting about security, the Circuit's Courthouse suffered an attack "likened to a firefight in Vietnam." Refusing to disqualify the Circuit destroyed the "appearance of justice."

… clerks of a *Casey's General Store* approached management with growing safety concerns. With their view of the lot obstructed by advertisements and merchandise, the clerks shuddered each time late-night customers opened the door. Without adequate security, the clerks felt vulnerable. They wanted only a clear view of the lot, a working surveillance camera and a panic button at the register. Management had the money to upgrade security, yet, it did nothing. Employees began joking that nothing would get done until someone got killed. One night, as clerks prepared the store for closing, a

customer awaited a fresh-cup of coffee. Suddenly, another customer entered the store, carrying a hammer. He bludgeoned the customer to death and seriously injured the clerks.

Other clerks of ***that*** *Casey's* couldn't hear this man's case – their interest in seeing him convicted and punished would disqualify them all. Yet, that is precisely what Ken faced in the 21st Circuit. Yes, judges are deemed to be less affected by their passions and prejudices than laypersons. *State v. Smulls*, 10 S.W.3d 497,499(Mo.banc200).

> [B]ut the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice *could* carry it on without danger of injustice. Every procedure which offers a *possible temptation* to the *average man as a judge* to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510,532(1927)(added). *Tumey* condemned the practice of letting rural mayors sit as judge over municipal violations, paying them only if "they convict[ed]" the defendant. *Id.*at512,523-524,535. Ohio defended this compensatory-justice, arguing that the $12 compensation was "so small that it is not to be regarded as likely to influence a judicial officer in the discharge of his duty." *Id.*at523-524. But the Supreme Court "[could] not regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest." *Id.*at532. Ohio also argued that Tumey was "clearly" guilty. *Id.*at535. Tumey, however, pleaded not guilty,

and "[n]o matter what the evidence against him, he had the right to have an impartial judge." *Id.*

The interest of the hypothetical *Casey's* clerks and of the 21st Circuit's judges isn't pecuniary. Neither is it "minute, remote, trifling or insignificant." Indeed, their personal safety concerns create a much greater likelihood of infecting the mind of "an average man as a judge" than the pecuniary interest in receiving a nominal fee. The "possible temptation" to the clerks and judges is vast. No judge of the 21st Circuit should have decided these questions of life and liberty.

Ordinarily, an entire circuit cannot be disqualified "absent agreement by all judges of [the] circuit" (L.F.78-79,*citing State v. Nunley*, 923 S.W.2d 911,918(Mo.banc1996)); *also Smulls*,*supra*. But, ordinarily, the standard for disqualification comes from the Code of Judicial Conduct. *Smulls*, 10 S.W.3d at499,n.2. The Code requires "a factual context that gives meaning to the kind of bias that requires disqualification of a judge." *Id.*at499,*citing State v. Haynes*, 937 S.W.2d 199,203(Mo.banc1996). Not all cases, however, can be decided under the Code. A few, rare cases must be decided under the Constitution. The Constitution reaches only the extraordinary case because "the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." *Bracy v. Gramley*, 520 U.S.899,904(1997). This is that case, and, failing to disqualify the 21st Circuit, violated Ken's rights to due process, a fair trial before a fair/impartial arbiter and freedom from cruel/unusual punishment. *See Oregon v. Haas*, 420 U.S. 714(1975)(states cannot grant less protection than the federal constitution provides).

Due process guarantees all defendants a fair trial before a fair tribunal. *In re Murchison*, 349 U.S. 133,136(1955). Due process requires more than the absence of actual bias in the trial of cases. It requires the absence of even the *probability* of unfairness. *Id*. "To this end…no man is permitted to try cases where he has an interest in the outcome." *Id.* The sort of interest due process condemns cannot be defined with precision. Rather, it condemns *any procedure* that *could* tempt the average man as a judge to obscure "the balance nice, clear, and true between the State and the accused." *Id*.,*quoting Tumey*, 273 U.S.at523.

Here, the crime victims conducted Ken's trial. In 1984, the 21st Circuit began its long struggle with county bureaucrats, bringing a budget dispute to this Court in 1989 (VenueEx.A,§A-2;SuppL.F.309-311;Appendix,A1-A6). Feeling vulnerable, the Circuit had "proposed a security plan designed to ensure judicial personnel, court employees and citizens…an environment…free of illegally carried dangerous and deadly weapons…." (SuppL.F.309-310;AppendixA1-A3). The County had the money to implement the Circuit's plan, but, nonetheless, rejected it. *Id.* The squabble continued for years, prompting jokes "that nothing would be done until somebody gets killed." (VenueEx.A,§A-2;AppendixA5). This joke proved prophetic.

On May 5, 1992, even as the sides met in the Courthouse discussing safety, "all hell br[oke] loose." (HammackTr.45;VenueEx.A,§A-2). Ken's "rampage" interrupted that meeting as the Circuit's worst-fears became reality (VenueEx.A,§§A-1,A-2). Without their security plan, Ken had walked into their Courthouse with two, loaded .38 specials in his briefcase and shot-up the place (Tr.1723-1724,1838-1843).

After shooting Mary twice, Pollard and Seltzer, Ken took aim and shot at Judge Hais, fleeing (Tr.1677-1680,1705-1707,1724-1725,1878-1880,183,1929-1933). Ken pursued Judge Hais, who narrowly escaped to his chambers (Tr.1679-1680,1707,1883, 1933-1934,1947-1952). Ken then proceeded up the hall, entered Judge O'Toole's offices and shot Bailiff Nicolay (Tr.2056-2060). Returning to the hall, Ken shot at two police officers and the prosecutor's investigator (Tr.1961-1967,2098-2099;L.F.670,676-678). Before being stopped by 9 bullet wounds, Ken shot another police officer (HammackTr. 29,44-45). Seltzer, Pollard and dozens of bystanders fled to various judges' chambers seeking safety (Tr.1883-1884,1935,2056-2057;VenueEx.A,§A-2,A-4).

Immediately, the County agreed to implement a tight security plan for the 21st Circuit (VenueEx.A,§A-2;AppendixA4-A5). How could trying Ken in the 21st Circuit not tempt any of its members to blur the balance between the State and Ken. Due process demanded that the Circuit be disqualified.

> [This] stringent rule *may sometimes bar a trial by judges who have no actual bias* and who would do their very best to weigh the scales of justice equally between the contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."

Murchison, 349 U.S. at136(quotation omitted)(added). Trying Ken in the 21st Circuit appeared quite unjust.

Nunley and *Smulls* didn't involve extraordinary procedures, and they do not apply, here. Nunley and Smulls filed PCRs alleging the bias of ***one*** judge in their circuit. In *Nunley*,*supra,* the defendant/movant alleged that his trial judge drank alcohol before

sentencing him. In *Smulls,supra,* the defendant/movant alleged that his trial judge made racist remarks. Neither allegation would necessarily infect the impartiality of the remaining judges in those circuits. Thus, Nunley and Smulls had to show that each judge was *in fact* disqualified.

This case, however, involves the bias of the entire circuit because the judges' *workplace served as the murder scene*, and Ken's actions impacted the entire Circuit. When charges were initially filed in 1992, the Circuit recused, and Ken's case was transferred to Judge Belt in Macon County. When those charges were dismissed and refiled,[21] Ken moved, again, for change of judge, alleging that no judge in the Circuit could hear his case since *their workplace was the murder scene* and their coworkers were victims (L.F.72-74,89-98,227-228,1030). The 21st Circuit couldn't "hold the balance nice, clear and true between the State and [Ken]."

In *Murchison,supra* at624-625, the judge served first as the "single 'judge-grand jury'" and then as the trial judge. The Supreme Court condemned that practice as falling below the constitutional floor.

> Having been a part of the [process of bringing the charge,] a judge cannot be, in the very nature of things, *wholly disinterested in the conviction or acquittal* of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. *Fair trials are too*

[21] PointV,*infra*.

important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

Id. at625-626(added).

What happened here holds the same dangers as *Murchison* and *Tumey*. Rather than playing a part in bringing the charges against Ken, or having a pecuniary interest in his conviction, the 21st Circuit hosted both the murder and the trial. The Circuit could not be "wholly disinterested" in Ken's conviction or acquittal. Ken's crime impacted everyone in the Circuit. It was so devastating that Judge Hais sobbed for nearly 30 minutes afterward (Tr.1952). Fair trials, and the appearance of justice are too important to let a Circuit serve as the tribunal for a murder committed therein. This Court must reverse and remand for retrial outside the 21st Circuit.

IV.[22]

The trial court abused its discretion in refusing to disqualify Judge Seigel because such ruling violated Ken's rights to due process, a fair trial before a fair/impartial arbiter and freedom from cruel/unusual punishment. U.S. Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. A reasonable person would see an appearance of impropriety and doubt Judge Seigel's impartiality given his extra-judicial information about Ken. In *Bakker, et al. v. Baumruk v. The Employee Savings Plan of McDonnell Douglas,* Judge Seigel learned through stipulated facts that Ken "intentionally shot and killed [Mary] without legal justification…[and] subsequently shot and wounded several other individuals in the Courthouse on this same date." From what he learned in *Nicolay v. Baumruk*, Judge Seigel found that Ken's "conduct was so outrageous, extremely intentional and certainly reflects reckless disregard to the rights of others, entitling [Nicolay to $25,000 punitive damages]." Judge Seigel—Ken's final sentencer—had prejudged Ken's culpability both for the charged murder and its accompanying aggravating circumstances.

The question is not whether Judge Seigel was actually prejudiced, but whether a reasonable person would have an objective basis to question his impartiality. *State v. Smulls*, 10 S.W.3d 497,499(Mo.banc2000). A reasonable person knows all that has been said and done in the judge's presence. *Id*. The judge must recuse if "something other

[22] Presented alternatively to Point III.

than what the judge has learned from participation in the case," causes him to prejudge an issue on the merits. *State v. Nicklasson*, 967 S.W.2d 596,605(Mo.banc1998). Here, Judge Seigel received copious information from extrajudicial sources that made him prejudge Ken's culpability for both the murder and its aggravators. Judge Cohen, who heard the motion to disqualify Judge Seigel, judicially noticed these extradjudicial findings by Judge Seigel (L.F.209-210,218,231-232).

Issue in ***State v. Baumruk***	**Judgment in** ***Nicolay v. Baumruk***
▪ Whether Ken's conduct involved "depravity of mind" by involving a plan to kill more than one person and showing callous disregard for all human life (L.F.32,894,1020).	▪ "[Ken's] conduct was *so outrageous, extremely intentional…*reflect[ing] reckless disregard to the rights of others, entitling…[$25,000] *punitives*" (L.F.215;SuppL.F.484)(added).
Issue in ***State v. Baumruk***	**Finding judicially noticed in** ***Bakker v. [McDonnellDouglas]***
▪ Whether Ken's conduct involved "depravity of mind" by involving a plan to kill more than one person and showing callous disregard for all human life (L.F.32,894,1020).	▪ "Taking into consideration *the aggravating circumstances* [of Mary's murder], judgment is…entered…in the total sum of …$1,000,000" (SuppL.F.375)(added).

Issues in ***State v. Baumruk***	**Stipulations in** ***Bakker v [McDonnell Douglas]***
▪ Whether Ken murdered Mary (L.F.17-18,1003).	▪ Ken "intentionally shot and killed [Mary] *without legal justification*" (SuppL.F.180)(added).
▪ Whether Ken killed Mary while trying to kill or seriously injure eight other people in the Courthouse (L.F. 31,893-894,1015-1019).	▪ After killing Mary, Ken "*shot and wounded several other individuals* in the Courthouse" (SuppL.F.180) (added).

Given these factual findings, a reasonable person would have doubted Judge Seigel's impartiality—with good reason. He prejudged these facts and then precluded Ken from rebutting the State's case with evidence he couldn't deliberate. PointsXIII,XIV,*infra*.

"The law is very jealous of the notion of an impartial arbiter. It is scarcely less important than his actual impartiality that the parties and the public have confidence in [his] impartiality…." *State v. Lovelady*, 691 S.W.2d 364,365(Mo.App.,W.D.1985). "No system of justice can function at its best or maintain broad public confidence if a litigant can be compelled to submit his case in a court where the litigant sincerely believes the judge is…prejudiced…." *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692,694 (Mo.App.,E.D.1990). That is the small price we pay to free litigants from feeling oppressed. *Id.* Thus "[a] judge *shall* recuse in a proceeding in which the judge's impartiality *might reasonably* be questioned…." Rule 2,Canon 3(E)(1)(added).

State ex rel. McCulloch v. Drumm, 984 S.W.2d 555(Mo.App.,E.D.1999) is analogous: In October 1995, Judge Drumm presided over Beverly Jaynes' first-degree murder trial. *Id.*at556. Judge Drumm refused to let Jaynes waive jury because, believing her psychiatric defense, Judge Drumm didn't think he could objectively conduct a jury-waived trial. *Id.* Jaynes' conviction was reversed for a new trial. *Id*. at557 (citation omitted). This time, Judge Drumm granted Jaynes' jury-waiver, and the State sought his recusal. *Id.* Judge Cohen presided over that motion and concluded that, "based on his personal familiarity with Judge Drumm and Judge Drumm's testimony [that he would not let his former opinions affect his judgment on retrial], he believed Judge Drumm could be fair…" *Id.* The Eastern District didn't doubt Judge Drumm's actual impartiality, but found an appearance of impropriety. *Id*.

Had Judge Drumm heard the case and acquitted Jaynes, a reasonable, disinterested bystander unfamiliar with Judge Drumm's personality and integrity could reasonably conclude that, despite his best intentions, the decision was influenced by his previous conclusions. Alternatively, had Judge Drumm heard the case and convicted Jaynes, she might well claim she was improperly induced to waive jury relying on his earlier judicial comments. Either way, an appearance of impropriety existed and recusal was required. *Id.*at557-558.

Judge Seigel presided over civil cases arising from Ken's criminal charges. As in *Drumm*, Judge Seigel prejudged the critical issues in this case—that Ken killed Mary "intentionally…and without legal justification," that in killing Mary, Ken simultaneously "shot and wounded" several others, and that Ken acted outrageously and "extremely

intentionally," disregarding all human life. That these civil findings were based on a lower standard of proof doesn't change the appearance that Judge Seigel prejudged Ken's criminal culpability. Recusal was required. Judge Seigel's participation violated Ken's rights to due process, a fair trial before a fair/impartial arbiter and freedom from cruel/unusual punishment.

As in *Drumm*, Presiding Judge Cohen heard this recusal motion (L.F.198,204). Judge Cohen again relied on his personal familiarity with the judge (L.F.204). He noted that Judge Seigel topped his list of potential judges for this assignment, explaining,

> The reason I say that is, Judge Seigel is one of the few people in the courthouse who was not on the bench at the time of this shooting, nor was he in the courthouse. So he is someone who did not go through—live through the events of the day. *I also know him to be a very fair judge, even-tempered, a good listener, someone who gives everybody their day in court.* and I would say that Judge Seigel would be the best possible person to try this case.

(L.F.224)(added). But Judge Cohen's beliefs that Judge Seigel is the "best" judge in the 21st Circuit to try Ken's case or that Judge Seigel isn't actually prejudiced doesn't address the issue. Judge Cohen erred in viewing this from his subjective perspective, not that of a reasonable, disinterested bystander. But, of course, *he* was not a disinterested bystander—his chambers served as Seltzer's sanctuary (Tr.1935). A **disinterested** person had copious reason to conclude that, despite Judge Seigel's best intentions, he would be influenced here by his prior findings regarding Ken's culpability.

Judge Cohen dismissed Judge Seigel's findings in *Nicolay*, saying "[t]hat was no real trial" (L.F.217). That begs the question: Why wasn't it a real trial? Judge Seigel had accepted a stipulation that Ken was permanently incompetent and appointed Martin Barnholtz as Ken's guardian *ad litem* (SuppL.F.474). This obliged Judge Seigel to monitor Barnholtz to ensure that he performed his duties. *Spotts v. Spotts*, 55 S.W.2d 977,983 (Mo.1932). Judge Seigel turned a blind eye to Barnholtz's defaulting on Ken's behalf.

As Ken's GAL, Barnholtz had to do for Ken "what with riper judgment [Ken] would [have done] for himself." *Id.* "A [GAL must] take all steps reasonably necessary to *protect and promote* the interests of his ward in the litigation." *In re M__ and M__*, 446 S.W.2d 508,513 (Mo.App.,Spr.D.1969)(added). Barnholtz had to appear for Ken, retain and assist counsel, collect testimony and summon witnesses. *Id.* But, he did nothing except write to Ken notifying him of the trial date and warning, "If you want to defend…, I suggest **you** immediately **retain** an attorney…" (SuppL.F.482)(added).[23]

Since he was subject to court-monitoring, Barnholtz copied his letter to Judge Seigel. *Id.* Judge Seigel should have intervened to ensure that Ken had a guardian not a scribe. Two months later, Barnholtz again wrote to Ken advising him that the trial had been continued and reiterating that *Ken* needed to retain counsel if he wanted to defend (SuppL.F.483). Barnholtz again copied Judge Seigel, and, again, Judge Seigel ignored Barnholtz's failure to protect Ken's interests. *Id.*

[23] The State conceded, "[Ken] had no contact with…Barnholtz." (L.F.218).

Nicolay v. Baumruk, No.641138 went to trial before Judge Seigel November 1,1996 (L.F.278). Ken was not there. *Id.* Barnholtz physically appeared for Ken, but nothing more. *In re M__,supra*. He didn't defend against Nicolay's allegations; he simply stipulated that Ken shot Nicolay (L.F.279). And Judge Seigel did nothing.

A reasonable, disinterested bystander had ample reason to believe that Judge Seigel—despite appointing a GAL—had prejudged Ken's competency and appointed a GAL as a means to an end. Otherwise, why let Barnholtz commit this fraud on his court? *Hemphill v. Hemphill*, 316 S.W.2d 582,587-588 (Mo.1958)(failure to defend one's ward "constitute[s] a fraud upon the court"). Judge Seigel had a duty to insure that Ken's interests were fully protected. *In re M__*, 446 S.W.2d at513. Instead, he sat quietly and entered a $100,000 judgment against Ken—including $25,000 punitives (SuppL.F.484).

Judge Seigel prejudged Ken's culpability; let Barnholtz invite a default judgment against Ken, and assessed punitive damages against him. Presiding over Ken's capital murder trial lent him an appearance of impropriety. A reasonable person would lack confidence in Judge Seigel's impartiality. This Court must reverse Ken's conviction and remand for a new trial before a fair/impartial judge.

V.

The trial court erred in entering judgment and sentence against Ken because such rulings violated Ken's rights to due process, freedom from cruel/unusual punishment, and freedom from bills of attainder. U.S.Const., Art.I,§10,Amends.V, VIII,XIV; Mo.Const.,Art.I,§§10,21. St.Louis County filed an 18-count indictment, charging Ken with murder, 8 assaults and 9 ACAs. The case was moved to Judge Belt in Macon County, and he found that Ken is permanently incompetent. Pursuant to this Court's mandate, Judge Belt dismissed the 18-count indictment. Since Judge Belt's dismissal was, by statute, with prejudice, no trial court had jurisdiction until a higher court authorized it. St.Louis County didn't appeal the dismissal, and collateral estoppel precluded it from simply refiling the dismissed charges in St.Louis County.

At oral argument in *State ex rel. Baumruk v. Belt,* No. SC79861, St.Louis County complained vociferously to this Court that "justice would be offended" by the dismissal of its 18-count indictment against Ken. But, as this Court aptly observed, justice applies the "rule of law, not a rule of what's offensive." *Id.* "Our society depends on a willing majority's steadfast fidelity to the rule of law to keep us from…anarchy." *In re Crouppen*, 731 S.W.2d 247,249(Mo.banc1987). The State cannot ignore the rule-of-law to suit its purpose.

In 1993, the parties agreed to move Ken's case to Judge Belt in Macon County. After hearing copious evidence, Judge Belt found that Ken was incompetent, (L.F.166-

173). Ultimately, he found Ken to be permanently incompetent (L.F.171-173). DMH then commenced a guardianship proceeding, during which a jury found that Ken didn't require a guardian. *State ex rel. Baumruk v. Belt*, 964 S.W.2d 443,443-444(Mo.banc 1998).[24] Although §552.020.10(6),RSMo1994, plainly mandated dismissal, Judge Belt refused, and Ken sought review in this Court. *Id.*

Meanwhile, a firestorm brewed. As Attorney General Nixon observed, "[Ken's] case…served as a fulcrum for change…" (VenueEx.A,§B-22,*accord*VenueEx.A,§B-10). "[O]utraged," St.Louis County complained that "justice would be offended" by such an "absurd result" as dismissal of its indictment. (VenueEx.A,§B-4);*Belt*,at446;*Belt*, No.SC79861(11/6/1997,Oral Argument). The Legislature responded, amending the statute in 1997. *Id.*

The 1994 Statute Applies to Ken

This Court, however, ruled that "[t]he amended section does not apply" to Ken. *Belt*, 964 S.W.2d at446,n.1. Any other ruling would constitute a bill of attainder, prohibited by U.S.Const.,Art.I,§10. The Bill of Attainder Clause is not a narrow prohibition; it implements the separation of powers by prohibiting "trial by legislature." *State ex rel. Bunker Resource Recycling and Reclamation, Inc. v. Mehan*, 782 S.W.2d 381,386(Mo.banc1990). A bill of attainder has two components: (1) it singles out a person or group and (2) it inflicts punishment upon that person or group. *Id.* The 1997 amendment to §552.020 singles out Ken. *Belt*,No.SC79861 (11/6/1997,Oral Argument);

[24] *See*(AppendixA16-A26).

(Venue Ex.A,atB-22). Further, it inflicts punishment by removing his right to be discharged—having been found permanently incompetent.

Because the 1994 statute applies, this Court ordered Judge Belt to dismiss indictment. *Belt, supra* at446-447. And, he complied. St.Louis County Prosecutor McCulloch announced, "I'm not the least bit upset with this…I'm pleased." (VenueEx. A,§B-22). Of course, McCulloch's goal had long been to "remove the case from [Judge] Belt's jurisdiction." (VenueEx.A,§B-8,*accord*VenueEx.A,§§B-6,B-9,B-12,B-13).

The Dismissal Barred Reprosecution

Section 552.020.10(6), RSMo1994 provided that once a defendant was found permanently incompetent, "the court shall dismiss the charges and the accused shall be discharged." The 1997 amendment shows that the prior law required dismissal with prejudice (*see*AppendixA41-A49, for full texts of both statutes):

§552.020.10(6),RSMo1994	*§552.020.11(6),RSMoCum.Supp.1997*
"If it is found that the accused lacks mental fitness to proceed and there is no substantial probability that the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall dismiss the charges and the accused shall be discharged…."	"If it is found that the accused lacks mental fitness to proceed and there is no substantial probability that the accused will be mentally fit to proceed in the reasonably foreseeable future, the court shall dismiss the charges **without prejudice** and the accused shall be discharged…." (added).

When amending a statute, the Legislature is presumed to intend to effect a change in the existing law. *Kilbane v. Director of Dept. of Revenue*, 544 S.W.2d 9,11(Mo.banc 1976). "[L]egislatures are not presumed to have intended a useless act." *Id.* The only change to this sentence was the addition of "without prejudice" after "shall dismiss the charges." To say that dismissals under the 1994 statute were also "without prejudice" would render the amendment moot. *See State v. Harris*, 705 S.W.2d 544,548(Mo. App.,E.D.1986). For the amendment to have effected any change to the existing law, dismissals under the 1994 statute had to be with prejudice. If they weren't, the 1997 amendment was superfluous.

The Trial Court Had NO Jurisdiction

Ignoring the dismissal of its indictment with prejudice, St.Louis County immediately refiled the 18-count indictment. It should have appealed Judge Belt's finding that Ken was permanently incompetent. *State v. Moore,* 952 S.W.2d 812(Mo.App.E.D. 1997). In *Moore,* the State adhered to the rule of law and appealed the order that dismissed its indictment pursuant to §552.020. Since Moore's trial court had erred, the State won the opportunity to take Moore to trial. *Id.*at814. By skirting their appellate remedy and simply refiling, St.Louis County violated Ken's rights to due process and freedom from cruel/unusual punishment.

St.Louis County had the right and the obligation to appeal. It chose to thumb its nose at the rule of law and simply start anew. That tactic violated due process by holding criminal allegations over Ken's head indefinitely. *See Jackson v. Indiana*, 406 U.S. 715,740(1972). "[S]ubstantial injustice [exists] in keeping an unconvicted person…in

custody to await trial where it is plainly evident his mental condition will not permit trial within a reasonable period of time." *Id.*at735(citation omitted). Judge Belt's finding and dismissal made it plainly evident that Ken was permanently incompetent.

St.Louis County prosecutors cannot simply forego their right to appeal, and refile their charges. Collateral estoppel precludes such posturing. *Ashe v. Swenson*, 397 U.S. 436,446-447(1970). By failing to appeal Judge Belt's judgment, St.Louis County let it become final. "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in *any future lawsuit*." *Id.*at443. Having lost and not appealed, the State couldn't constitutionally hale Ken before a different court, searching for a win. *Id.*at446.

Maneuvering like this destroys the rule of law. Prosecutors represent the sovereign, "whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution *is not that it shall win a case, but that justice shall be done*." *Berger v. U.S.*, 295 U.S. 78,88(1935)(added). Prosecutors are also officers of the court, giving them "the high calling and the freely accepted, special obligation of allegiance to the rule of law…." *Crouppen*, 731 S.W.2d at749.

By failing to appeal Judge Belt's ruling, St.Louis County waived its chance to try Ken on its 18-count indictment. Justice is not a case-by-case concept that yields to the whim of prosecutors. The rule of law demands that this case be dismissed and that Ken be discharged from this 18-count indictment.

VI.

The trial court abused its discretion in precluding Ken from asking jurors whether they would be predisposed to vote for the death penalty since Ken not only shot and killed his wife but "he also shot others" because such ruling violated Ken's rights to due process, a fair trial, effective counsel, effective/reliable sentencing and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§2,10,18(a),19,21. The fact that Ken shot others in the courthouse carries a "substantial potential for disqualifying bias." Indeed, recalling this "critical fact," mock-juror Sinclair concluded that she couldn't give Ken a fair trial. Ken suffered a "real probability of prejudice" since the State emphasized during its guilt and penalty cases that Ken shot several people besides Mary and indeed planned "to kill as many of the people…as he could," noting that only "by the grace of God" were there no other fatalities. The presence of even one juror who would be biased by this critical fact creates a real probability of prejudice.

On Tuesday, May 5,1992, Ken shot Mary twice. He also shot her attorney, his attorney (twice), Bailiff Nicolay and Officer Dillon. Additionally, he shot at Judge Hais, Officers Salamon and Neske, and Investigator Hartwick (twice). Although the jury would only decide Ken's guilt regarding Mary's death, it would hear copious testimony regarding the entire "rampage" (Ex.8;Tr.1677-1680,1705-1708,1723-1725,1877-1880, 1883,1929-1933,1948,1959,1967,2055,2059,2069,2079,2096,2099;HammackTr.23,44-45;L.F.677-681). To select Ken's jury, however, the trial court concluded that potential

jurors could only hear that the State had charged Ken with killing Mary (Tr.1225-1226,1256). Ken could not even mention that the State further alleged that Ken "also shot others." *Id.* This violated his rights to due process, a fair trial, effective counsel, effective/reliable sentencing and freedom from cruel/unusual punishment.

The right to a fair and impartial jury guarantees defendants "an adequate voir dire to identify unqualified jurors." *State v. Clark*, 981 S.W.2d 143,146(Mo.banc1998), *citing Morgan v. Illinois*, 504 U.S. 719,729(1992). An inadequate voir dire makes it impossible for trial courts to fulfill their responsibility to remove biased jurors. *Morgan* at729-730. There are countless possible questions, thus, "the trial court has discretion to determine the appropriateness of specific questions." *Clark* at146. The trial court abused its discretion in foreclosing any inquiry as to the effect on the potential jurors of the added allegation that Ken "also shot others."

Ironically, at the change of venue hearing, the court agreed to tell the mock-jurors that the State alleged that Ken "shot and killed [Mary]…***and then attempted to kill or cause serious injury to eight other individuals in this courthouse.***" (Tr.13,18)(added). This additional fact identified a disqualifying bias in mock-juror Sinclair. Sinclair stated, "I couldn't give him a fair trial. Because he hurt innocent people, regardless of whatever domestic violence he had with his wife, other people were hurt because of him." (Tr.99-100). She could not presume Ken innocent (Tr.101-102). Yet, the trial court precluded Ken from identifying this type of bias among the actual jurors.

Certainly, counsel could not have presented the potential jurors with facts in explicit detail. *Clark*,*supra*. He didn't try. The facts he sought to give the potential

jurors were hardly explicit. They didn't even go as far as the statement the court had *given* during the mock-voir dire. Counsel's inquiry simply would have notified Ken's potential jurors that the case involved other victims, thus letting counsel learn whether, given this critical fact, jurors were predisposed to convict and to impose death.

In *Clark*,*supra* at145, the defense wanted to voir dire on one of the victim's being only 3 years-old. The trial court refused that inquiry, and this Court reversed despite the defense's failure to proffer a specific question. *Id.*at146. The young victim's age was a critical fact—one "with substantial potential for disqualifying bias." *Id.* Clark's retrial proves the importance of a complete voir dire on such facts:

1st Trial[25]	**Retrial**[26]
M1st/M1st Death/Death	M1st/**M2nd** ***LWOP/20 years***

Here, when counsel first tried to ask the potential jurors about the allegation that Ken "also shot others…," the State objected that that wasn't a critical fact (Tr.1224-1225). The trial court agreed (Tr.1225).

[25] *Id.* at147.

[26] *State v. Clark*, 45 S.W.2d 501(Mo.App.,E.D.2001).

Before publicity voir dire resumed for its second day, counsel renewed his request to question the potential jurors about this critical fact (Tr.1251-1256). The State objected that such questioning sought a commitment, repeating that the inclusion of other victims was not a critical fact (Tr.1253-1254). Counsel emphasized the need to "ferret out" whether jurors could realistically consider both punishments in *this* case and that required questioning about the other victims. The trial court retorted, "Is it your position that anytime we have first-degree murder and there are–there is going to be a death penalty-phase, there may be aggravating circumstances, that you should be able to ask about any aggravating circumstances?" (Tr.1256). Counsel answered "no" and pointed out that he in that other was not trying to voir dire on *every* aggravator, but reemphasized that this is a "critical fact people were placed at harm and it makes it unique." *Id.* Disagreeing, the court again precluded the inquiry, but gave counsel a continuing objection to that ruling. *Id.* Two final jurors (Bean and Belding) came after this (Tr.1264-1265,1269-1274;L.F. 980-983). Counsel renewed his objection in Ken's motion for new trial (L.F.1036).

The trial court abused its discretion in refusing to let Ken "ferret" out this bias at trial (Tr.1255-1256); *alsoClark,supra.* Of course, this Court will reverse a conviction only if Ken "suffer[ed] a 'real probability of injury.'" *Clark,* 981 S.W.2d at147,*citing State v. Betts,* 646 S.W.2d 94,98(Mo.banc198).

The question is whether the fact is one that carries a "substantial potential for disqualifying bias." *Clark,* 981 S.W.2d at147. Mock-juror Sinclair certainly viewed the fact that others were shot as a *critical*. And so did the prosecutor when it came time to present his case. The State's evidence had much less to do with Ken's killing Mary than

with what the State called Ken's "attempt at mass murder" in the St.Louis County Courthouse (Tr.2021;AppendixA75;*accord*Tr.2003,2005,2019,2021,2023,2024,2238, 2243;AppendixA57,A59,A73,A75,A77,A78,A101,A104,A109;*also*Tr.1651-1653,2030, 2035,2038). The State told the jurors that Ken "came prepared for battle to kill as many as he could possibly kill. *That is what we are talking about* and *for that* he deserves…death." (Tr.2235;AppendixA101)(added).

In *Clark,supra,* this Court found a real probability of injury because "the prosecutor emphasized the fact that a child was involved." In its guilt-phase opening statement and closing argument, the prosecutor reminded Clark's jurors of this critical fact. One juror left the courtroom sobbing "after viewing autopsy photographs of [the child]." *Id.*at148. "Even one partial juror constitutes a real probability of injury." *Id.;Morgan*, 504 U.S.at734,n.8.

Ken, likewise, suffered a real probability of injury. During publicity voir dire, seventeen jurors volunteered that they recalled hearing that Ken had not only shot Mary, but had shot others as well: *See Jurors* Brockelmeyer(Tr.1018); Holbrooke(Tr.1020); Evans(Tr.1029); ***Johnson***(Tr.1069);[27] ***Snodgrass***(Tr.1072); Smith(Tr.1077); Elliot (Tr.1116-17); Elswick(Tr.1119); Bouiesledge(Tr.1201); ***Bean***(Tr.1264); Killingsworth (Tr.1279); Kaibel(Tr.1318); Seim(Tr.1319); Kwiatek(Tr.1358); Macko(Tr.1413); Jaedemann(Tr.1435); Bersett(Tr. 1485). This left 83 jurors who knew nothing about there being other victims, until the State sprang it on them in its guilt-phase opening

[27] Highlighting denotes final jurors.

statement. And it left 100 jurors with whom Ken had no opportunity to "ferret out bias" stemming from the critical fact of there being other victims.

The State emphasized that Ken had "attempt[ed] mass murder" (Tr.2023; AppendixA77):

What the jurors heard in voir dire	***What the jurors heard during trial***
A. Ken shot and killed Mary: (Tr.1010;*accord*Tr.1059,1108,1145, 1200,1264,1310,1356,1411,1472).	*A. Ken shot and killed Mary:* (Tr.1643,1677-1678,1705,1724-1725, 1878,1929,1933,1998,2239-2240,2258). *Ken also "tried to kill" Pollard; Seltzer; Judge Hais; Bailiff Nicolay;Officers Dillon, Salamon, Neske,and Mudd; and Investigator Hartwick:* (Tr.2038;*accord* Tr.1651-1655,1677-1680,1705-1708, 1723-1725,1877-1880,1883,1929-1933, 1948,1959,1967,2003,2005-2006,2019-2021,2023-2024,2030,2032-2033,2035, 2055,2069,2079,2096,2099,2235-2236, 2238-2239,2243;HammackTr.23,44-45; L.F.677-681).

This made the probability of injury quite real. The State benefited from preventing counsel from questioning the jury about what it called Ken's "attempt at mass murder."

The State's inflammatory rhetoric exacerbated the injury Ken suffered. The prosecutor wove the fact that Ken "also shot others" through its entire case. During his guilt-phase closing arguments, the prosecutor reminded the jury that those "who had to witness the carnage in Division 38…" showed "raw emotion" (Tr.1998;AppendixA52), describing one witness as still being "frightened out of her mind" (Tr.2006-2007; AppendixA60-A61). He highlighted George Barnes' emotional response to "having sold a gun that…shot a police officer." (Tr.2001;AppendixA55). He referred to Ken having "tried to hunt down and kill Judge Hais" (Tr.2020;AppendixA74) and having plotted "to kill as many people [as] he could" (Tr.2003;AppendixA57;*accord*Tr.2005,2019, 2021,2023,2024;AppendixA59,A73,A75,A77,A78). But he wasn't done, during his penalty-phase closing arguments, the prosecutor reminded the jurors that Ken "came prepared for battle to kill as many as he could possibly kill." (Tr.2235;AppendixA101; *accord*Tr.2238;AppendixA104), adding that Ken "tried to inflict as much carnage, as much mayhem and as much murder as possible." (Tr.2243;AppendixA109). He concluded that only "by the grace of God" did Ken fail in his attempt at "plan to become a mass murderer" (Tr.2238-2239;AppendixA104-A105). Clearly, Ken suffered a "real probability of injury" and this Court must reverse and remand for a new trial.

VII.

The trial court erred in finding Ken competent to proceed, in making him stand trial and in sentencing him because such rulings violated Ken's rights to due process, freedom from cruel/unusual punishment and not to be tried while incompetent. U.S.Const.,Amends.V,VIII,XIV; Mo.Const.,Art.I,§§10,21;§552.020, RSMo1994. Ken suffered two gunshot wounds to his head, the removal of "portions of his brain," hydrocephalus and insertion of tubes to drain fluid from his brain. He has Dementia due to Head Trauma and Post-traumatic Amnesia, making it impossible for him to assist in his defense or to testify on his behalf. Ken can, however, read, learn and recite. The State took Dr. Rabun to various witnesses to whom Ken made statements about having shot his wife, two attorneys, "another guy" and having shot at Judge Hais. Ignoring that Ken had received detailed information about the 18 criminal charges stemming from his "rampage" in the Courthouse before making those statements, Dr. Rabun simply adopted his prior opinion—rejected by Judge Belt—that Ken was competent because he "suspect[ed] malingering." Collateral estoppel precluded relitigation of this issue.

In February 1994, *all* doctors agreed that Ken suffered from amnesia regarding the charged offenses and "for some time" thereafter (L.F.168;AppendixA10). Judge Belt concluded that Ken also suffered from dementia, a mental defect and could neither understand the proceedings nor assist his counsel (L.F.168-169;AppendixA10-A11; L.Tr.6;Comp.Ex.I). Ken went to DMH (L.F.170;AppendixA12).

Initially, DMH disagreed with Judge Belt, but, during the six-month re-evaluation mandated by §552.020, DMH determined "to a reasonable degree of medical certainty" that Ken suffered from dementia due to head trauma, rendering him unable to assist in his defense (L.F.171-172;AppendixA13-A14;Comp.Ex.F,at6-7). DMH found Ken "incompetent to stand trial and…*a substantial probability that [he] would not regain competency*" (L.F.171-172;AppendixA13-A14;Comp.Ex.F,at7)(added).

To refute these findings, the State hired Dr. Rabun (L.F.172;AppendixA14;Tr.401-402). Rabun "*believed* [Ken] was fit to proceed." (L.F.311)(added).

In September1995, Judge Belt rejected Rabun's belief and found Ken permanently incompetent (L.F.171-173;AppendixA13-A15). During subsequent guardianship proceedings, jurors found that Ken didn't need a guardian to meet his daily needs. *State ex rel. Baumruk v. Belt*, 964 S.W.2d 443,444 (Mo.banc1998).[28] Ken promptly moved to dismiss the 18-count indictment, and although §552.020.10(6),RSMo1994,[29] mandated dismissal, St.Louis County complained that "justice would be offended" by such an "absurd result." *Belt*,at446; *Belt*,No.79861 (11/6/1997,Oral Argument). Disagreeing, this Court ordered Judge Belt to dismiss the charges pursuant to §552.020.10(6),RSMo1994, and, on March 30,1998, he did.

Ordinarily, Missouri "jealously guards" an incompetent defendant's right not to be tried, convicted or sentenced. *Drope v. Missouri*, 420 U.S. 162(1975). We impose a duty

[28] *See*AppendixA16-A26.

[29] *See*AppendixA41-A44.

on prosecutors and judges alike to request a competency evaluation whenever there is reason to doubt a defendant's competence. *State v. Tilden*, 988 S.W.2d 568,578-580(Mo. App.,W.D.1999). Neither fulfilled their duty here. Within minutes of Judge Belt dismissing the 18-count indictment, St.Louis County prosecutors returned home and refiled those same 18 charges—despite Ken being permanently incompetent (L.F.17-30). The system failed. PointV,*supra*.

Assuming arguendo that prosecutors could refile these charges, the proceedings had to stop immediately upon the refiling. When reasonable doubt as to the defendant's competence exists, the proceedings *must* stop. *Tilden*,*supra*. This mandate "is fundamental to an adversary system of justice." *Drope*, 420 U.S.at172. Here, both the prosecutors and the judge had overwhelming reason to doubt Ken's competence. His permanent incompetence had just been judicially determined. *Belt*,*supra*. Though *Drope*,*supra* at171, condemns the arraignment of an incompetent person—since he "is not able to plead," the State and court immediately arraigned Ken on the refiled indictment (L.F.1,62)—both ignored their duty and forged ahead. Then, on August 3, 1998, they litigated defense counsel's motion for change of venue still ignoring the overwhelming reason to doubt Ken's competence.[30] Permanently incompetent, Ken had "no opportunity to defend himself." *Drope*, 420 U.S.at171.

Finally, in December1998, the court ordered a competency evaluation (L.F.124-126). The court foreshadowed its ruling, however, by accepting Rabun as its expert.

[30] Ironically, Ken was physically absent from that hearing. PointXI,*infra*.

Rabun had first entered the fray in 1994 when the State hired him to refute DMH's finding that Ken was permanently incompetent, and Rabun did just that (Tr.260,409;L.F. 167;Comp.Ex.3). Now, as the court's expert, Rabun set-out to reaffirm his prior belief that Ken was competent. He hired Dr. Scott, whom he viewed as an excellent and ethical psychologist, to double-check his belief that Ken was malingering (Tr.266). But when Scott found that Ken wasn't malingering, Rabun simply clung to his personal suspicion to the contrary (Tr.588,601,710-712). He let the State take him to select-witnesses, whose lay opinions that Ken had a memory of the crime, Rabun blindly adopted (Tr.448-449). Meanwhile, he ignored all information that showed that Ken had only acquired-knowledge of the crime. The State bore the burden of proof (L.F.634-636,652), and, under the unique circumstances of this case, it didn't satisfy its burden. The trial court erred in finding Ken competent to proceed.

In1999, Rabun agreed that Ken suffered from permanent, post-traumatic amnesia—a mental defect (L.F.318-319;Tr.278). While agreeing that this would impede Ken's ability to testify, Rabun concluded that Ken could nevertheless assist counsel since he could read, learn and recite new information (L.F.318-319,322;Tr.281,288,290). This *Alford*-plea[31] approach to preparing Ken's defense begs two questions: 1) How would reading the discovery enable Ken to reconstruct his mental state so that he could assist counsel in investigating diminished capacity; and 2) How would reciting the discovery enable Ken to testify effectively at trial.

[31] *Alford v. N.C.*, 400 U.S. 25(1970).

These precise difficulties arose in *State ex rel. Sisco v. Buford*, 559 S.W.2d 747(Mo.banc1978). There, Sisco was accused of murdering his girlfriend. *Id.* Immediately after shooting her, Sisco shot himself in the head. *Id.* Sisco was rushed to the hospital, where doctors removed part of his brain. *Id.*at748. Sisco suffered permanent amnesia for the period surrounding the murder, and he "[could not] in an orderly fashion help counsel in the preparation of his defense [nor could he] testify effectively as to what occurred." *Id.* Consequently, he could not stand trial. *Id.*at749.

Like, Sisco, Ken has severe brain damage (DefEx.B;Tr.878-891;L.Tr.13,17-19). The CAT scans unequivocally illustrate the severe progression of injuries to Ken's brain. The gunshot wounds severely bruised and damaged Ken's brain (Tr.882;DefEx.B-6). One bullet lodged in the cerebellum (Tr.883;DefEx.B-6). But he didn't simply suffer two gunshot wounds to his head; doctors removed parts of his brain. "[They] had to remove …surroundings of the extensive bruising in the cerebellum and occipital lobe" (Tr.884; L.Tr.105;DefExs.B-7,B-8). The damage to Ken's brain continued; two days later, Ken developed hydrocephalus—an obstruction of fluids in the ventricles of his brain that "pushe[d] the brain against the skull casing." (Tr.885-888;L.Tr.12;DefExs.B-7,B-8). To combat this, doctors inserted a drain-tube into Ken's brain, destroying even more cells (L.Tr.14;DefEx.B-8). The result: memory loss and brain damage (L.Tr.78).

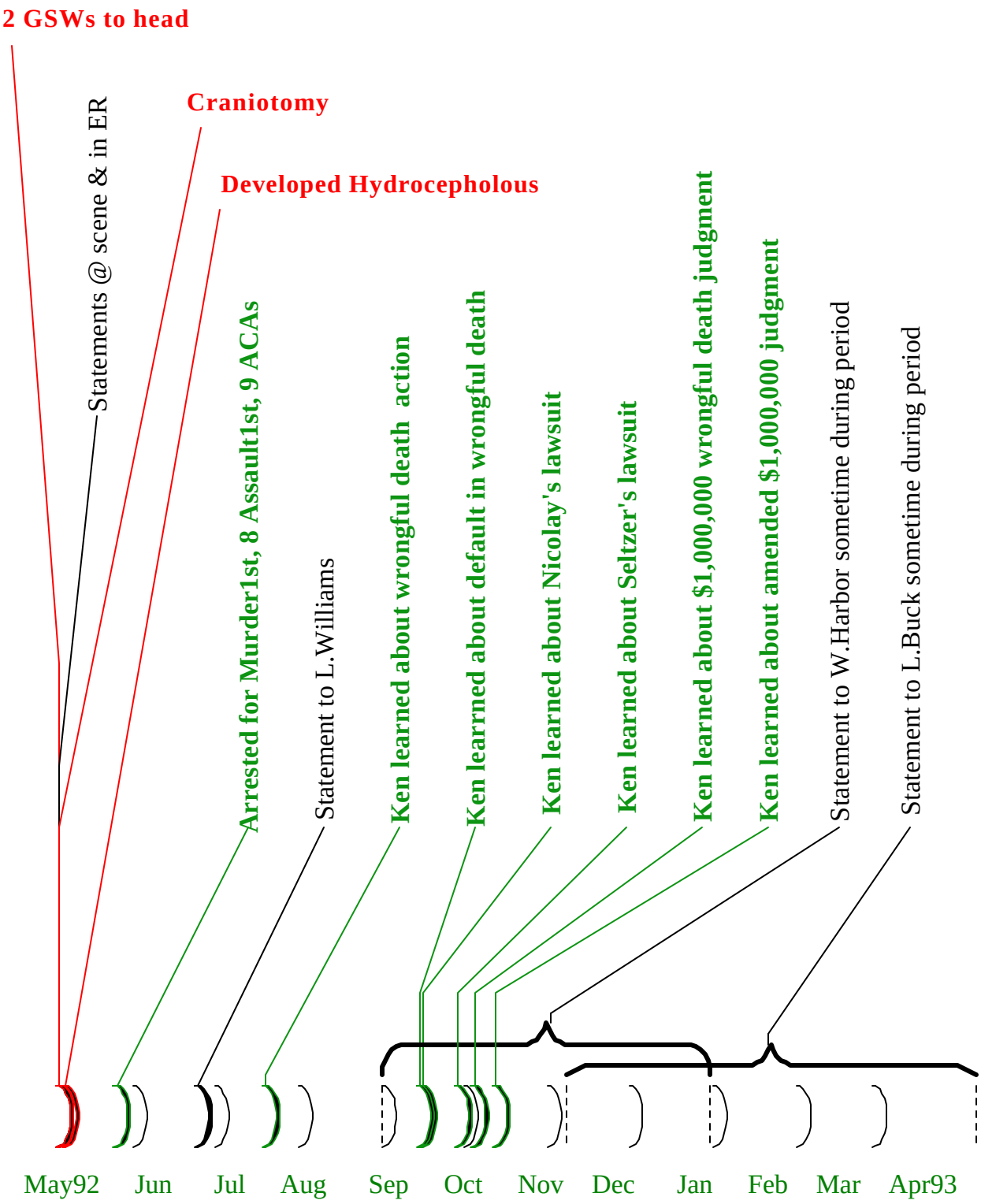
Immediately after being shot and, again, in the ER, Ken stated that he had shot Mary (Tr.1973,2108-2109;HammackTr.66). The trial court, however, does not point to these comments as demonstrating memory. After all, those statements were made *before*

the information had time to be stored in Ken's memory (Tr.892). The craniotomy further insulted Ken's brain, blocking the storage of the shootings into his memory (L.Tr.105).

Unqualified to interpret Ken's CAT scans, Rabun simply dismissed Ken's brain damage as inconsequential. Rabun adopted a faulty premise that Ken has selective memory loss, insisting that Ken "chooses to forget an incriminating fact." (Tr.355, *accord*Tr.337,357). From this assumption, Rabun transformed his presupposition that Ken was malingering into a conclusion (Tr.337,355-357). But Ken remembered buying the guns, packing them in his suitcase, taking them to St.Louis, putting them in his briefcase and going to court (*E.g.*,Tr.262). These are hardly innocuous facts—they tend to show deliberation; yet, Ken remembered them because they had had time to be stored before *any* injury to his brain.

In May2000, the State contacted Rabun and took him to select witnesses, who suddenly claimed that Ken had told them about the shootings and who opined that Ken spoke from memory (Tr.415-421,587). "Suspect[ing]" that Ken was malingering, Rabun adopted these witnesses' lay opinions without even considering that Ken's statements were based on acquired-knowledge, not memory (Tr.588, 601;L.Tr. 93-95,103-107).

Ken had been arrested on the 18-count warrant four weeks before making *any* statement (L.Tr.96,106;DefEx.N;AppendixA31-A35). And, from the moment of that arrest, Ken received a steady stream of materials detailing the shootings. As the following time-line illustrates, Rabun's haste to corroborate his suspicions left him ill-informed:



(L.F.309;Ex.N;Tr.300-311,315-327,642-643,762-763,884-890,1926,1973,2108-2109,

2114;L.Tr.11-19,105-114;HammackTr.54-59,66;Supp.L.F.286-287,295-297,343-350,

375-377,401). Ken knew about the charged shootings four weeks before his statement to Williams. Rabun simply translated acquired-knowledge into "memory."

"[Competency] is a sensitive constitutional issue. While the law is reasonably clear, the application of the law to the facts of any given case is often very difficult." *State v. Johns*, 34 S.W.3d 93,104(Mo.banc2001). And it can't get any more difficult than, here, where the State seeks to ignore the rule-of-law so that it can execute a permanently incompetent man. Tragically, Judge Seigel foreordained the result of his competency inquiry. By accepting Rabun—the State's hired-gun—as his own expert, his finding that Ken had become miraculously competent was a foregone conclusion. Whether a defendant is competent or incompetent can't depend solely on the forum in which he finds himself. The sensitivity of this constitutional issue demands precise evaluation.

This Court must accept as true all evidence and reasonable inferences that support the trial court's ruling. *Id.* Also, a "mere disagreement among the experts…[doesn't] necessarily indicate error." *Id.* But, this Court cannot blindly accept the trial court's ruling. Indeed, the trial court's error stems from its blindly accepting Rabun's suspicion as its judgment (Tr.588,601;L.F.757).

Prosecutors gave Rabun a few selected snapshots aimed at bolstering Rabun's suspicion that Ken was malingering:

- Dr. Kane said that as Ken lay in the ER awaiting emergency brain surgery, he said, "I shot the bitch because of the divorce." (Tr.322-323;HammackTr.66).

- Lisa Williams said that on June 23, 1992, Ken said, "You're just like my wife. You deserve what she got. I killed her, I shot some lawyers and I wish I would die." (Tr.307,642).
- Inmate Harbor said that sometime in late-1992, he asked Ken, "Why did you shoot the lawyers?" (Tr.310). Ken answered "that his wife was having sex with one of the lawyers and [they] were going to take all of his money…." *Id.*
- SocialWorker Buck said that sometime between November 2,1992 and April 27,1993, Ken said he shot his wife and lawyers and shot at Judge Hais because the divorce wasn't going his way (Tr.315-318,759,761,764).
- Inmate Sickinger said that sometime between March 1998 and July 1998, Ken said he shot Mary and then shot the lawyers and tried to shoot the judge (Tr.302,304). Ken also said he had read that he shot a bailiff. *Id.*
- Officer Glenn said that on October 10, 1998, Ken said "when she crunched her lips, I shot her then." (Tr.352-354,858).

These witnesses' lay assumptions that Ken was speaking from *his memory* was all that Rabun wanted because he already "suspect[ed] malingering" (Tr.448-449,588,601). Indeed, when Buck said that Ken didn't receive police reports until April 27, 1993, Rabun assumed his job was done. Worse, Rabun insisted that it wasn't his responsibility to decide whether these witnesses were credible in their opinions that Ken was speaking from *his memory* (Tr.550-551,587). Without investigating whether these statements were Ken's memory or his acquired-knowledge, Rabun couldn't make a rational decision.

Rabun made his decision based upon suspicion, but "[t]he possibility that a thing may [have] occur[red] is not alone evidence, even circumstantially, that the thing did occur." *Boyington v. State*, 748 So.2d 897,901 (Ala.Crim.App.1999). Rabun's suspicion-based conclusion demonstrates that his investigation was a ruse. When Scott's evaluation found that Ken *was not* malingering, Rabun ignored it (*see*Tr.588,601,710-712). Rabun had no "facts or propositions known to be true" from which he or the court could deduce that Ken was malingering. *Draper v. Louisville & N.R.Co*., 156 S.W.2d 626,630(Mo.1941). He simply had his supposition, "conjecture based on the possibility that a thing could have happened." *Id.*

The trial court erred in finding that Rabun reached a "credible and persuasive" decision after a "thorough investigation" (L.F.759). Rabun ignored copious evidence showing that Ken had acquired-knowledge, not memory:

- Police served Ken with his arrest warrant on May 26,1992, informing him that he was being charged with murdering Mary, and assaulting Pollard, Seltzer, Nicolay, Dillon, Neske, Mudd, Hartwick, and Salamon (DefEx.N;Appendix A31-A35).
- Ken immediately had three attorneys representing him on those charges. *Id*. A reasonable attorney's first task is discussing the State's allegations with his client.
- In July1992, Ken learned that Bakker had filed a wrongful death case, aimed at punishing him for killing Mary (SuppL.F.286-287).

- He received two more notices of Bakker's allegations over the next two months. (SuppL.F.297).
- In September1992, Ken received summonses, informing him that Nicolay and Seltzer were seeking damages for the injuries he inflicted on them (SuppL.F.338-350,401).
- In October1992, Ken learned that Bakker won a $1,000,000 default judgment against him and that she had earlier intervened in the divorce (SuppL.F.375-381).

Judges have a continuing duty to assess a defendant's competence. *Tilden,supra* at575. He "must always be alert to circumstances suggesting [the defendant] is unable to meet the standards of competence." *Id.,quoting Drope,* 420 U.S.at180. He must remain vigilant in considering the impact of "*all* information properly before [it]." *Tilden,* 988 S.W.2d at576. Judge Seigel didn't. Rather, after accepting Rabun's hypothesis, he set the issue aside. He agreed with Rabun that Ken can read, learn and recite information (Tr.289-290;L.F.756), but he ignored the copious evidence within his file demonstrating that Ken had done just that—recited information from his acquired-knowledge.

When an amnesic defendant is taken to trial, the court must, "before imposing sentence," evaluate the amnesia's effect on the defendant's competence. *Wilson v. U.S.,* 391 F.2d 460,463-464(D.C.Cir.1968). Judge Seigel needed to address the extent to which the amnesia affected Ken's ability to assist and to testify. *Wilson, supra*. "If there is any substantial possibility that the accused could, but for his amnesia, establish…a defense, it should be presumed that he would have been able to do so." *Id.*

Counsel tried to investigate diminished capacity, but Dr. Cuneo could not reach that opinion because of Ken's amnesia (Tr.2039-2040,2159-2161;L.F.70). There is, however, a substantial possibility—if not probability—that but for Ken's amnesia he could have established a diminished capacity defense. Dr. Cuneo described "indicators of suicide" leading up to this offense, including the deaths of his aunt, uncle and mother, his divorce and his *ex parte* eviction (Tr.1716,1900,1909,2160-2161,HammackTr.93-94,99-101;L.F.58-60;SuppL.F.14-16;RefusedExs.A,B;AppendixA80-A92). People don't normally carry their deceased mother's ashes with them for months before finally planning a memorial service (Tr.2160;HammackTr.100). Ken was under severe stress.

"Stress is cumulative…it keeps building." (Tr.2161). Unfortunately, Ken cannot remember his thoughts or actions during the offense, thus Cuneo couldn't reach an opinion about diminished capacity (Tr.2161). Ironically, Ken's amnesia prevented him from establishing his only defense. The actions attributed to him by witnesses show very bizarre behavior. He took *no* steps to protect himself—walking past stairs, elevators and escalators to reenter the main hallway where several police waited (HammackTr.27-29, 44-45,54-59;Tr.1976,2114). Even as he lay bleeding, he reached for his gun, as if begging police to shoot him again and again (HammackTr.32;Tr.2108,2114).

The court ignored the copious evidence before it and blindly accepted Rabun's conclusion that Ken was competent. This deprived Ken of due process and subjected him to cruel/unusual punishment. Furthermore, the State cannot simply "refine [its] presentation in light of the turn of events at the first trial…[collateral estoppel precludes that]." *Ashe v. Swenson*, 397 U.S. 436,446-447(1970). When an ultimate fact has been

determined by a final judgment, it cannot be relitigated between the same parties in any future lawsuit. *Id.*at443. This Court must reverse Ken's conviction and order him discharged. *See*§552.020,RSMo1994.

VIII.

The trial court abused its discretion in refusing to strike Juror Belding for cause thereby depriving Ken of due process, a fair trial before a fair, "impartial, indifferent" jury, and subjecting him to cruel/unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. The publicity surrounding Ken's case left Belding with no question that Ken did the shooting. He *thought* he could acquit Ken if the State did not prove its case, but being human, he admitted there was a danger that his decision "could be influenced" by the publicity he had heard. Belding's presence on the jury created a real probability of injury to Ken.

Ken's right to a jury trial required "a panel of impartial, indifferent jurors." *Turner v. Louisiana*, 379 U.S. 466,471(1965)(quotation omitted). He didn't get that; instead, he got a trial tainted by the "danger" that publicity would influence Juror Belding's decision. This violated Ken's rights to due process, a fair trial before a fair, "impartial, indifferent" jury, and freedom from cruel/unusual punishment.

Juror Belding didn't "***unequivocally*** indicate[] [his] ability to evaluate the evidence fairly and impartially." *State v. Feltrop*, 803 S.W.2d 1,7(Mo.banc1991)(added). He couldn't enter the jury box with a mind free of bias and prejudice, yet, he sat in judgment of Ken. *State v. Wheat*, 775 S.W.2d 155,158(Mo.banc1989). Ken's life was at stake. The proceedings aimed at taking his life required heightened reliability. *Woodson v. N.C.*, 428 U.S. 280,305(1977).

Belding knew that Ken had done the shooting – "there is no question about that." (Tr.1270). When asked if he could base his decision only on the evidence, Belding said, "I think so." *Id*. Belding said he would "do [his] best," but he admitted that he was only "human" and thus could be influenced by "things" in his head (Tr.1271). He admitted there "would be a danger" that his decision could be influenced by the publicity he had heard (Tr.1273). After all, "[he's] human." *Id.* Nevertheless, the court refused to strike Belding for cause, and Belding served on Ken's final jury (Tr.1290-1291;L.F.983,1034-1035).

Trial courts have broad discretion to determine whether a prospective juror is qualified. *Feltrop*,*supra*. Without more, the fact that a potential juror has formed an opinion based on publicity does not disqualify the juror. *Id*. But if the juror's opinion will not yield so that he may sit in the jury box with an open mind, indifferent to its outcome, he is disqualified. *Id.* Again, a juror's ability to set aside his opinion must be unequivocal. *Id*. Belding could never unequivocally say that he would set aside the opinion he had formed based on the pervasive publicity.

Belding confessed to being "human" with the accompanying "danger" that he would be "influenced" by the publicity that he'd heard. When asked whether he could hold the State to its burden of proof, he, first, could only say, "I think so." (Tr.1270, 1274). When the court asked the same question, Belding repeated, "Yes, I think so." (Tr.1274). Apparently noting some hesitation, the court pressed and Belding admitted that he "would have to hear what the facts are." In the end, the best Belding could promise was, "I'll say yes." (Tr.1275). Of course, the question was what would he do,

not what would he say. After all, jurors tend to minimize the effect of outside influences. *Travis v. Stone*, No.SC83551, 2002 WL 77709, slip op. 6 (Mo.banc January 22,2002). Juror statements trying to minimize the affect those influence, however, can rarely overcome the presumption of prejudice from such influences. *Id.*

Belding "unambiguously" explained the "danger" that the publicity would "influence" his verdict. While the trial court tried to get an unequivocal response, Belding couldn't give it. "I'll say yes" doesn't erase Belding's other responses, the context of which illustrates that Belding couldn't make such an assurance. He would need to hear what facts were presented before making that assurance.

The trial court abused its discretion in refusing to strike Belding, but there must also be a "real probability of injury." *Feltrop*, 803 S.W.2d at7. The jury deliberated Ken's fate for nearly five hours (Tr.2264,2267). There is a real probability that the "danger" of Belding being influenced by the publicity he'd heard decided Ken's fate. "A constitutional jury means twelve [people] as though that number had been specifically named; and it follows that, when reduced to eleven, it ceases to be such a jury quite as effectively as though the number had been reduced to a single person." *Patton v. U.S.*, 281 U.S. 276,289(1930). This Court must reverse Ken's conviction and sentence and remand for a new trial.

IX.

The trial court plainly erred, resulting in manifest injustice, in not declaring a mistrial, *sua sponte,* during Prosecutor Waldemer's guilt and penalty arguments because such failures violated Ken's rights to due process, a fair trial before a fair/impartial jury and freedom from cruel/unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. Waldemer sought Ken's guilt and death by

1. **arguing that jurors "heard no evidence" that anger that brewed for 1½ years prevented Ken from deliberating—evidence Waldemer got excluded;**
2. **arousing jurors' hostility by reminding them, "We didn't have metal detectors here in 1992" and including them as victims of the attack on "this courthouse, *your* courthouse;"**
3. **inciting jurors to decide Ken's fate based on the case's "raw emotion;"**
4. **telling jurors their decision would reverberate "through the community" that expected a death verdict;**
5. **arguing Ken's failure to testify—"he doesn't care" and "has no remorse."**

Prosecutors must remain impartial. *State v. Storey*, 901 S.W.2d 886,901(Mo.banc 1995). After all, they share the trial court's obligation to guarantee the defendant gets fairly tried. *State v. Tiedt*, 206 S.W.2d 524,526(Mo.banc1947). Prosecutors occupy a "quasi-judicial position." *Id.;accord*Rule4-3.8,Comment. They must not become "a heated partisan, nor engage in vituperation of the [defendant]." *Tiedt,supra* at526. They

have a duty to seek justice, not just a conviction. *Berger v. U.S.*, 295 U.S. 78,88(1935). They mustn't inject into the jurors' minds any matter that would add to the prejudice already produced by the charge. *Tiedt,supra* at527; *State v. Horton*, 193 S.W. 1051,1054 (Mo.1913).

Waldemer saw his role in this case quite differently. Orchestrating a series of arguments aimed solely at goading jurors into finding Ken guilty of first-degree murder and sentencing him to death, Waldemer stepped out of his mandated-role and rendered any alleged fairness of the trial's evidentiary phases irrelevant. *Tiedt,supra* at527. Waldemer's "argument is filled with improper statements." *Newlon v. Armontrout*, 885 F.2d 1328,1337(8th Cir.1989).

Like prosecutors, trial judges must also ensure that the defendant gets fairly tried. *Tiedt,supra*. Although judges have wide discretion in controlling closing arguments, they have no discretion to allow plainly unwarranted and injurious arguments. *Donnelly v. DeChrstoforo*, 416 U.S. 637,643(1974). This is true even, as here, when counsel doesn't object. After all, judges aren't passive moderators. They must correct, even *sua sponte*, errors that could significantly promote a just determination of the trial. I ABA Standards for Criminal Justice, Special Functions of the Trial Judge 6-1.1(2ed.1979).

Nonetheless, this Court won't routinely grant relief from erroneous arguments that were not preserved for appeal because "trial strategy looms as an important consideration." *E.g., State v. Clayton*, 995 S.W.2d 468,478(Mo.banc1999). But, one factor in determining whether improper arguments caused prejudice is whether defense counsel acted to "minimize the prejudice." *Newlon*, 885 F.2d at1337,n.10. Here, counsel

exacerbated Waldemer's improper arguments by throwing Ken to the wolves. Counsel told jurors that Ken doesn't deserve "compassion…or mercy and sympathy;" "He's not deserving of anything." (Tr.2245,2248,2252,2254,2255;AppendixA111,A114,A118, A120-A121). This Court should find plain error from the prosecutor's blatantly improper arguments and avoid inevitable post-conviction relief. *See State v. Lewis*, 443 S.W.2d 186,189-190(Mo.1969)(found plain error so "a later [post-conviction] review…may be avoided.").

1. arguing that jurors "heard no evidence" that anger that brewed for 1½ years prevented Ken from deliberating—evidence Waldemer got excluded

Defense counsel didn't deny that Ken shot Mary, but he did deny that Ken did so after deliberation (*e.g.*,Tr.2009-2017;AppendixA63-A71). Ken's amnesia foreclosed a pure diminished capacity defense (Tr.2039-2040,2159-2161;L.F.70), so counsel tried to rebut deliberation with anecdotal facts. He proffered RefusedExs.A,B to illustrate that he had become so angry during the 1½ year-divorce that he could not deliberate (Tr.1898-1908;AppendixA80-A92). Waldemer objected and got Ken's evidence excluded. *Id.*; PointXIII,*infra*. Then, he argued,

> In this case, I assume what [defense counsel is] trying to tell you, is this man over a year and a half got so angry that he was out of control. *But you heard no evidence of that*.
>
> ***
>
> He says his life is out of control, *yet there is no evidence of that*.

(Tr.2018;AppendixA72)(added). And, again,

> "It doesn't mean that he doesn't cooly [sic] reflect, because *if there was that kind of evidence, you would have heard it. There was none of that*."

(Tr.2021;AppendixA75)(added).

It is well-settled in Missouri that it is error for a prosecutor to comment on or refer to evidence or testimony that the court has excluded." *State v. Weiss*, 24 S.W.3d 198,202(Mo.App.,W.D.2000)(quotation omitted). Indeed, such comment results in plain error. *Id.; State v. Hammonds*, 651 S.W.2d 537,538-539 (Mo.App.,E.D.1983); *State v. Luleff*, 729 S.W.2d 530,535(Mo.App.,E.D.1987). In *Weiss*, 24 S.W.3d at203, the prosecutor made "positive misrepresentations" that Weiss didn't have evidence that had been excluded based upon the State's objection thereto. Compounding that misrepresentation, the prosecutor had sought and received a ruling excluding Weiss' evidence outside the hearing of the jury. *Id.*at204. Thus,

> it appears from his later conduct, he did not want the jury to know that Defendant was trying to introduce these documents because he wanted to argue that the fact that Defendant did not introduce them meant that they did not exist. This makes the prosecutor's conduct even more improper here.

Id.

Likewise, here, Waldemer objected when counsel asked Pollard to identify RefusedExs.A,B (Tr.1898). The jury had *no idea* what these documents were, let alone that they would refute the *sole issue* in the case. "[T]his distasteful tactic" has been uniformly denounced as manifestly unjust. *Weiss*, 24 S.W.3d at204;*accord Hammonds*,

supra;Luleff,supra. Here, Ken's only defense was that he did not deliberate. The State blocked his only avenue of proof and intentionally misrepresented to the jury that no such evidence existed. This Court must reverse Ken's conviction.

2. reminding jurors that "[w]e didn't have metal detectors here in 1992" and thus including jurors as victims of the attack on "this courthouse, *your* courthouse"

That Ken "had a gun *here* [in the Courthouse] and shot some people" disturbed the community (Tr.58,65,79)(added). Fifty-six percent of the people believed him to be guilty (Tr.162-163;L.F.102,111). Publicity forever linked him to enhanced security at St.Louis County's Courthouse (Tr.24,47,57,1082,1206,1208,1275,1288,1319,1330,1366, 1441,1493,2003). People feared Ken (*e.g.*,Tr.50;VenueEx.A,§B-5). And Waldemer systematically played on their fears, arguing:

a. "We didn't have metal detectors here in 1992." (Tr.2003;AppendixA57);
b. "He was getting ready to do what he intended to do, which was to kill as many of the people he could in St. Louis." *Id.*;
c. "It's a man who thought he was going to come to St. Louis, take the system into his own hands and commit murder. This was a coolly calculated attempt at mass murder." (Tr.2023;AppendixA77);
d. "By the grace of God he was successful with only one person." *Id.*;
e. "You are dealing with a man, when he came into this courthouse, a public building in St. Louis County, a building where citizens come to have their

disputes settled in a law-abiding way, where citizens come for justice, whether it be a criminal case or a civil case, and he came prepared for battle to kill as many as he could possibly kill. That is what we are talking about and for that crime the appropriate punishment is death." (Tr.2235;AppendixA101);

f. "He came here with a plan to become a mass murderer." (Tr.2238;Appendix A104);

g. "He … didn't care that they were members of your community." (Tr.2239; AppendixA105);

h. "These are important members of the community, ladies and gentlemen, they deserve justice in this case." (Tr.2243;AppendixA109);

i. "He came into this courthouse, your courthouse, and he tried to inflict as much carnage, as much mayhem and as much murder as possible. For that he deserves the ultimate punishment." *Id.*;

j. "By the grace of God … he didn't succeed [in his plan to be a mass murderer]." (Tr.2238;AppendixA104); and

k. "You will send a message with your verdict, whatever it is. It will go out through the community when you go back to your friends, your family, your co-workers, your neighbors. And as citizens of the county you have to tell him that for what he did … he should know from you, the citizens of this county, that for what he did in this courthouse, that you think he should face the ultimate punishment, because each of you know in your heart that's what's right, that's what's just." (Tr. 2257;AppendixA123).

Prosecutors must avoid arguments that arouse personal hostility toward, or personal fear of, the defendant. *Tiedt,supra* at527. Tiedt's crime was "so savagely brutal as to naturally [sic] arouse and inflame emotions." *Id.*at529. Rumors and publicity had "stirred" the community, causing many to form opinions about Tiedt's guilt. *Id.* "These intangible elements necessitated all the more restraint on the part of the prosecut[or]." *Id.* This Court reversed Tiedt's first-degree murder conviction and death sentence, concluding, "[I]nflammatory appeals to arouse bias and hostility toward defendant, or to engender fear of personal safety in the minds of the jurors, cannot be sanctioned." *Id.*

It must also reverse Ken's conviction and death sentence. Unrelenting in his quest to arouse jurors' hostility and to provoke their fear of Ken, Waldemer made jurors feel that, "but by the grace of God," they or their loved-ones could have been victims. Such tactics stripped Ken's trial of any legitimacy and cannot be sanctioned.

3. inciting jurors to decide Ken's fate based on the case's "raw emotion"

"Trials of charges for which there is a human abhorrence should be conducted with scrupulous fairness to avoid adding other prejudices to that which the charge itself produces." *State v. Alexander,* 875 S.W.2d 924,929(Mo.App.,S.D.1994)(quotation omitted). This is particularly true for capital murder; after all, death *is* fundamentally different than any other punishment. *Woodson v. N.C.*, 428 U.S. 280,305(1977). When death is at stake, there is no room for caprice and emotion; reason must prevail. *Booth v. Maryland*, 482 U.S. 496,508(1987), *quoting Gardner v. Florida,* 430 U.S. 349,358(1977)

(plurality opinion); *also State v. Taylor*, 944 S.W.2d 925,937 (Mo.banc1997). Ignoring this, Waldemer repeatedly invited an emotional verdict rather than a deliberative one:

a. "I know you saw each **raw emotion** each one of those witnesses had who saw him murder his wife, each witness who was shot, each witness who had to witness the **carnage** in Division 38 has **emotion**." (Tr.1998;AppendixA52);

b. "You listened to George Barnes,…you saw how he was **emotional** about having sold a gun that killed someone and about having sold a gun that shot a police officer." (Tr.2001;AppendixA55);

c. "…Sandy Woolbright, who nine years later **frightened out of her mind**, was hoping he didn't get her." (Tr.2006-2007;AppendixA60-A61);

d. "Remember their faces, remember their **emotions**. It's nine years ago. Every single one of them lives with it today. Every single one had to look at him and said, that's the man who tried to take me away." (Tr.2239;AppendixA105);

e. "Go back to last Wednesday, Sandy Woolbright. Nine years later and she's **still scared** of this whole thing. All she was doing was her job and she could have been easily killed too." (Tr.2240;AppendixA106);

(added). "[I]t is improper to urge the jury to impose the death penalty based on emotion, not reason." *Taylor*, 944 S.W.2d at937. In *Taylor*, the State told the jury to show its "outrage" and put their "emotion into it." *Id.* Here, after making these emotional pleas, Waldemer told jurors, "Don't feel sympathy for him because nine years have passed. Do what is right." (Tr.2244;AppendixA110). I.e., "feel sympathy" for the victims and

sentence Ken to death. This Court cannot condone such emotional ploys in a death case; it must reverse Ken's convictions and sentences.

4. telling jurors their decision would reverberate "through the community" that expected a death verdict

In *State v. Thomas*, 780 S.W.2d 128,133-135(Mo.App.,E.D.1989), the prosecutor told the jurors that their families and friends would expect an explanation if they found Thomas not guilty. This "did much more than appeal to the jury to reject [Thomas'] claim of coerced confession by concentrating on common sense." *Id*.at134. Implying that the jury would have to explain its verdict is "unwarranted and unwise." *Id*.at135. Prosecutors must avoid such inflammatory appeals; "it offers an unnecessary, *substantial* claim of error to the defendant." *Id*.(added).

Nonetheless, Waldemer argued,

> You will send a message with your verdict, whatever it is. It will go out through the community when you go back to your friends, your family, your co-workers, your neighbors. And as citizens of the county you have to tell him that for what he did … he should know from you, the citizens of this county, that for what he did in this courthouse, that you think he should face the ultimate punishment, because each of you know in your heart that's what's right, that's what's just.

(Tr.2257;AppendixA123). Waldemer could have argued "that the jury should 'send a message' to the community that criminal conduct will not be tolerated." *State v. Link*, 25 S.W.3d 136,147 (Mo.banc2000). But that's not what he did. Playing on jurors' fears,

PointIX(2) and emotions, PointIX(3), Waldemer encouraged mob-rule. His thesis was simple—Ken attacked "this courthouse, your courthouse" and the community, comprised of "your friends, your family, your co-workers, your neighbors" expect him to get the death penalty as punishment for that attack. This exceeded the bounds of fairness and cannot be condoned because it could well have been this argument that tipped the scales in favor of death after nearly five hours of deliberation (Tr.2264-2267). This Court must correct this manifest injustice.

5. arguing Ken's failure to testify—"he doesn't care" and "he has no remorse"

Criminal defendants cannot be compelled to testify on their own behalf. U.S. Const.,Amends.V,XIV;Mo.Const.,Art.I,§19;§546.270;Rule27.05(a). Comment that a defendant exercised this right is prohibited. *Griffin v. California*, 380 U.S. 609,615 (1965); *State v. Parkus*, 753 S.W.2d 881,885(Mo.banc1988). References to "defendant" and "testify," *or their equivalents*, mandate reversal. *State v. Gleason*, 813 S.W.2d 892,897(Mo.App.,S.D.1991). When no contemporaneous objection is made, the reference must be *"direct* and *certain*." *Parkus*, 753 S.W.2d at885 (original).

Waldemer did precisely that, arguing:

a. "**He doesn't care**. He doesn't care then and **he doesn't care *now***." (Tr. 2240; AppendixA106);

b. "He didn't care, **he *still* doesn't care**. **It doesn't bother him in the least**." (Tr. 2241;AppendixA107); and

c. "You know **he has no remorse** over these acts." (Tr. 2258;AppendixA124).

(added).

This is indistinguishable from *DeLosSantos v. State*, 918 S.W.2d 565(Tex.App.-San Antonio1996) and *State v. Arther*, 350 S.e.2d 187,191(S.C.1986). In both cases, the prosecutors highlighted the defendants' failures to testify by commenting that they had not expressed any remorse. In *DeLosSantos*, the prosecutor argued,

> What about the five people that are left dying? Any remorse for them? Did we ever hear an "I'm sorry. Let me see what I can do. Let me help you?"…Did the Defendant ever stop and say, "Oh, my God. I didn't mean to do all of this. I am sorry, Roland. I am sorry Priscilla.?"

918 S.W.2d at570. The State argued that this referred only to a lack of remorse at the scene and in the days thereafter. *Id.* The *DeLosSantos* Court disagreed, ruling that the argument usurped the defendant's fundamental right against self-incrimination. *Id.* at571-572.

Here, Waldemer's message wasn't that Ken had not expressed remorse at the time of the offense or in the days thereafter. He spoke in the present tense to hammer his "direct and certain" message that Ken hadn't testified or apologized. This argument usurped Ken's fundamental right to stand silent. That he didn't show remorse in May 1992 may have been open for comment. *State v. Oxford*, 791 S.W.2d 396,402 (Mo.banc1990). That Ken "doesn't care now," "still doesn't care" and "has no remorse" caused manifest injustice. Had Waldemer referred to Ken's silence during his guilt phase argument, any error would have been purged by the "no-adverse-inference instruction," telling them they couldn't consider Ken's silence as any inference of guilt (L.F.1002).

But he did it in penalty-phase, where no instruction told jurors they couldn't consider his silence in assessing his punishment (L.F.1012-1027); *Arther,supra*. This Court must reverse Ken's death sentence and remand for a new sentencing trial.

Manifestly Unjust Arguments

A mistrial is a drastic remedy. *State v. Schneider*, 736 S.W.2d 392,400 (Mo.banc 1987). Nevertheless, a mistrial should be granted when the prejudice cannot be removed any other way. *Id.* These are such errors. Waldemer referred to excluded evidence, to Ken's silence and to community conscience; he aroused jurors' fears and hostilities, and he invited a verdict based on "raw emotion." Failing to declare a mistrial, the court violated Ken's rights to due process, a fair trial before a fair/impartial jury and freedom from cruel/unusual punishment. "[T]he effect of the errors ... was cumulative and egregiously prejudicial." *State v. Burnfin*, 771 S.W.2d 908,912(Mo.App.,W.D.1989); *also Storey, supra* at902. Waldemer was free to strike hard blows, but not foul ones. *U.S. v. Sanders*, 547 F.2d 1037,1043(8thCir.1976). "[C]ounsel for the state [sank] his fangs…too deep for the poison to be withdrawn." *Tiedt*, 206 SW.2d at528. The qualitative difference between death and all other punishments requires a greater degree of scrutiny. *Woodson*, 428 U.S.at305. This Court must reverse, lest manifest injustice will result.

X.

The trial court plainly erred, resulting in manifest injustice, in admitting Investigator Hartwick's deposition *in lieu* of live-testimony because such ruling deprived Ken of face-to-face confrontation, due process and a fair trial and subjected him to cruel and unusual punishment. U.S.Const.,Amends.V,VI,VIII, XIV; Mo.Const.,Art.I, §§10,18(a),18(b), 21. To prove an aggravating circumstance, the State relied on the videotaped deposition of Hartwick, at which counsel purportedly waived Ken's presence. The right to confrontation, however, is personal to Ken, and *he* did not waive his presence.

The State alleged that Ken should be executed because, *inter alia*, he murdered Mary while attempting to murder Investigator Hartwick (L.F.893-894,1018-1019). Hartwick did not testify at trial because he was out-of-the-country (L.F.655-656). Before trial, the State and defense counsel deposed Hartwick in Ken's absence, and the State played that videotaped deposition for the jury (Tr.2093;L.F.655,665). Hartwick testified that Ken was "expressionless" when he fired two shots at Hartwick (L.F.676-681). This deprived Ken confrontation, due process and a fair trial and subjected him to cruel and unusual punishment.

While Hartwick may have been unavailable for live-testimony in May,2001, more is required to render his deposition admissible against Ken. Indeed, "[t]he primary object of the [Confrontation Clause] *was to prevent depositions*...[from] *being used against the prisoner* in lieu of a personal examination and cross-examination of the witness." *State v.*

Jackson, 495 S.W.2d 80,84(Mo.App.,K.C.D.1973), *quoting Mattox v. U.S.*, 156 U.S. 237,242-243(1895)(*Jackson's* emphasis). Missouri's Constitution forbids use of depositions in criminal trials unless they fully protect "the rights of *personal confrontation* and cross-examination of the witness by the defendant." Mo.Const.,Art.I, §18(b)(added); *Jackson,supra*; *State v. Glease*, 956 S.W.2d 926,930-931 (Mo.App.,S.D. 1997). Hartwick's deposition didn't fully protect Ken's confrontation rights—Ken wasn't there.

The right to confront adverse witnesses "cannot be accomplished by either the defendant or his *counsel alone." Jackson*, 495 S.W.2d at84 (*Jackson's* emphasis). The presence of the defendant is essential. Counsel could cross-examine the witness forever, yet, never accomplish the constitutional objective of face-to-face confrontation. *Id*. "The substance of the constitutional protection is *preserved to the prisoner* in the advantage he has once had of seeing the witness [face-to-face], and of subjecting [him] to the ordeal of cross-examination." *Barber v. Page*, 390 U.S. 719,722 (1968)(added). This fundamental right is personal to the defendant -- counsel cannot waive it. *Clemmons v. Delo*, 124 F.3d 944,956(8th Cir.1997), *relying on Brookhart v. Janis*, 384 U.S. 1,7(1966). Indeed, "reasonable jurists" cannot dispute the violation of Ken's confrontation right. *Id*.at955.[32] Manifest injustice will result if this error isn't corrected. Rule 30.20.

[32] *Clemmons* "ha[d] no trouble concluding" that appellate counsel rendered ineffective assistance when she failed to raise the issue in this Court despite there being no objection from trial counsel. 124 F.3d at954.

Ken's case is indistinguishable from *Clemmons*,*supra*. There, Captain Gross heard Clemmons confess. *Id.*at954. Gross did not testify at trial. Instead, "with the consent of Clemmons' *lawyer*," the State used Gross' deposition testimony. *Id.*(added). But Clemmons was not present for the deposition, and nothing in the record "remotely approache[d] a waiver by Clemmons." *Id.*at956. Admitting the deposition denied Clemmons face-to-face confrontation of one of his two accusers. The State could not show that that error was harmless beyond a reasonable doubt. *Id.*at955. The same is true, here.

Admitting Hartwick's deposition denied Ken face-to-face confrontation of his only accuser as to this aggravating circumstance. The State cannot show that this error was harmless beyond a reasonable doubt—the jury deliberated nearly five hours before imposing death. Thus, this Court must reverse Ken's death sentence and remand for a new penalty-phase trial.

XI.

The trial court plainly erred in letting counsel block Ken's presence at the August 3,1998 hearing without personally addressing Ken because such ruling violated Ken's rights to due process, be present throughout "criminal prosecutions," a fair trial and freedom from cruel/unusual punishment. U.S.Const.,Amends. V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. Ken had a fundamental right to be present since his presence would have contributed to the hearing's fairness, and the trial court had a "serious and weighty responsibility" to elicit *from Ken* whether *he* knowingly, intelligently, and voluntarily waived his presence. If left uncorrected, this error will cause manifest injustice in that Ken's absence made it impossible for the court to assess the scope of prejudice in the jury-pool since some jurors could remember the event and Ken's face, but not his name.

We have all had the experience of meeting a familiar person on the street but being unable to recall that person's name. This is especially true when years have passed since we met the person. We remember his face, but not his name.

Likewise, hearing Ken's *name* did nothing for many St.Louis County citizens; it was Ken's face they remembered—his shooting-spree indelibly imprinted in their minds. Indeed, six years later, over 71% of them remembered the shootings at their Courthouse and roughly 56% had decided that Ken was guilty (Tr.162,220). As Venireperson Sinclair put it, "[W]hat I can vision, I can remember seeing him on the stretcher, bringing

him out of the courthouse and the other people that had been involved in the shooting." (Tr.99-102).

Sinclair was not alone. The Warren Poll that counsel commissioned showed that only 7.6% of St.Louis Countians could remember Ken's name (L.F.110). The others needed to see his face, but counsel prevented Ken from attending the hearing (Tr.3). Ken had been brought from the jail to the Courthouse to attend this hearing, but counsel told the guards to take Ken back (L.F.132,268-269;Tr.4-5). Ken never even got to see Judge Seigel (L.F.132;Tr.3-6).

Counsel told Judge Seigel that keeping Ken out of the courtroom for this hearing "was a trial strategy decision." *Id.* But the purpose of this hearing was to show that the jury-pool in St.Louis County could not give Ken a fair trial. That couldn't be shown in Ken's absence. Indeed, Ken's absence made Venireperson Mueller ponder whether he was even thinking of the right case because he could not remember "the names" (Tr.59,62;*accord*Tr.24-28).

Ken's right to be present is not limited to presence at trial. *U.S. v. Gagnon*, 470 U.S. 522,526 (1985). The Due Process Clause guaranteed him "the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730,745 (1987). The Missouri Constitution gives Ken a specific right to be present throughout the "criminal *prosecution[]*," which encompasses far more than trial. Mo.Const.,Art.I,§18(a) (added). Ken's presence at the August 3,1998 hearing would have added to its fairness.

The question is whether counsel's claimed strategy effectively waived Ken's right to be present. In a case of first impression, *State v. Sanders*, 539 S.W.2d 458,463 (Mo.App.,St.L.D.1976) opined that counsel can waive his client's presence. But this general statement is overbroad and cannot apply here. Its reasoning applies only "in a noncapital case." *Id*.at462 (citation omitted).

Notably, the U.S. Supreme Court has twice implied that two types of defendants can never waive their right to be present: capital defendants and incarcerated defendants. *Diaz v. U.S.*, 223 U.S. 442,455(1912); *Crosby v. U.S.*, 506 U.S. 255,260(1993). The lower courts are split regarding the right of these defendants to waive presence:

NO	**YES**
• *Hall v. Wainwright*, 733 F.2d 766,775 (11th Cir.1984)—incarcerated; • *U.S. v. Gordon*, 829 F.2d 119,1245,n..7 (D.C.Cir.1987)—incarcerated; and • *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified in* 706 F.2d 311,312(11th Cir.1983)—incarcerated;	• *U.S. v. Watkins*, 983 F.2d 1413(7th Cir. 1993)—incarcerated; • *Larson v. Tansy*, 911 F.2d 392, 395 (10th Cir.1990)—incarcerated; and • *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994)—capital.

This disagreement aside, however, there is wide agreement that defense counsel cannot waive these defendants' right to be present. *Larson,supra*. at396, *citing Gordon*, 829 F.2d at124-26 (counsel couldn't waive defendant's right to be present for voir dire);

Profitt, 706 F.2d. at312 (counsel couldn't waive defendant's right to be present at competency hearing); and *Cross v. U.S.*, 325 F.2d 629,631-33(D.C.Cir.1963) (counsel's assertion that defendant didn't wish to attend trial didn't waive defendant's right to be present). After all, a waiver of a fundamental right must be viewed skeptically. *Glasser v. U.S.*, 315 U.S. 60,70(1942). Reviewing courts must "indulge in every reasonable presumption *against* the waiver of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458,464 (1938)(added).

Courts may not "presume acquiescence in the loss of fundamental rights." *Id*. (citation omitted). The trial judge bears a "serious and weighty responsibility" to prevent an unknowing, unintelligent and unintentional waiver of a fundamental right. *Id.* at465. A valid waiver must constitute "'an intentional relinquishment or abandonment of [such] known right or privilege.'" *McCarthy v. U.S.*, 394 U.S. 459,466(1969), *quoting Zerbst*, 304 U.S.at464. Consequently, the trial judge must obtain a waiver of presence from the defendant personally, in open court, and on the record. *Larson*,*supra* at396-397; *Gordon*,*supra* at 25-26; *Cross*,*supra* at631-633; and *Watkins*,*supra* at1420-1421.

In *State v. Johns*, 34 S.W.3d 93(Mo.banc2001), this Court addressed a similar issue, but, unlike here, counsel in *Johns* didn't force his client's absence. Johns appeared for part of the penalty-phase, but "when the defense offered the testimony of its competency experts, Johns did not appear." *Id*. at116. Counsel announced, "Mr. Johns has instructed me—or asked me to tell the Court that he prefers not to be in the courtroom for [the upcoming evidence]." *Id.* Such voluntary absence creates a presumption of a valid waiver, particularly since Johns waited until his appeal to

complain. *Id*. "[T]here was no evidence that trial counsel made a decision that was forced upon [Johns]." *Id.*

Ken presents a vastly different problem. He did not voluntarily absent himself from the August 3,1998 hearing. But for counsel telling the guards to take Ken back to his cell, Ken would have been present for this critical hearing for change of judge/venue (L.F.132;Tr.3-6). Additionally, Ken did not wait until this appeal to complain. He complained to the trial court, citing counsel's forcing his absence as one reason for removing counsel from his case (L.F.132). The trial court simply ignored Ken's complaint and violated Ken's rights to face-to-face confrontation, due process, a fair trial and freedom from cruel/unusual punishment.

Holding this hearing in Ken's absence was tantamount to holding voir dire in his absence for it had the same purpose. Conducting voir dire in the defendant's absence prejudices the judicial process and requires automatic reversal because it strips him of the opportunity to observe prospective jurors' responses or to give advice and suggestions to counsel. *State v. Muse*, 967 S.W.2d 764,767-768(Tenn.1998). Noticing Muse's absence, the trial court inquired whether Muse would be present for voir dire. *Id.*at766. Without explanation, counsel simply responded in the negative. *Id.* Voir dire had been rescheduled and the record didn't indicate that Muse had been informed. *Id.*at767. Certainly, the trial court never inquired whether Muse had been so informed. *Id.* Noting the "long-standing presumption against waiver," the Tennessee Supreme Court found that Muse had not waived his presence. *Id.*

Here, the record conclusively shows that but for counsel's forcing Ken to be absent, Ken would have been present for this hearing. Ken did not waive his presence, and counsel cannot force a waiver upon him. Indeed, the *Sanders* Court expressly noted that it was "not confronted with the situation where the defendant has requested the right to be present at the hearing with that request being refused." 539 S.W.2d at462-463. This Court is confronted with a situation where an incarcerated, capital defendant has been affirmatively turned away from the courtroom, forced to be absent from a critical hearing in his case. This is a grave miscarriage of justice. Rule 30.20. Therefore, this Court must reverse Ken's conviction and remand for a new trial.

XII.

The trial court plainly erred, resulting in manifest injustice, in overruling counsel's repeated objections and letting the State present victim impact evidence during the guilt-phase because such rulings violated Ken's rights to due process, a fair trial before a fair/impartial jury, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. The State elicited that Pollard, Seltzer, and Salamon were each married with children and that Pollard had grandchildren; this proved no fact in issue, but simply prejudiced the jurors. After first preventing counsel from questioning the venire whether the fact that there were other victims would prejudice their verdict, the State then used the other victims and their family ties to encourage the jurors to base their verdict on emotion.

In guilt-phase, the sole question for the jury was whether Ken had deliberated. Evidence that Ken had shot Pollard and Seltzer was admissible because it tended to answer that question. The State was also entitled to show the circumstances surrounding Mary's death. *State v. Flenoid*, 838 S.W.2d 462,467(Mo.App.,E.D.1992). Thus, evidence that Ken shot at Salamon was admissible to complete the picture for the State. But the State didn't stop with this legitimate evidence. It elicited that Pollard, Seltzer and Salamon each had families affected by Ken's actions. This victim impact evidence did not tend to answer any guilt-phase question. It simply tugged at the jurors' emotions.

Trial courts have broad, but not unfettered, discretion in admitting evidence. *State v. Bernard*, 849 S.W.2d 10,13(Mo.banc1993). Before admitting evidence, trial courts must decide (1) logical relevance—does it tend to prove or disprove a fact in issue; and (2) legal relevance—does its probative value outweigh its prejudicial affect. *Id.* Evidence that diverts the jury's attention or causes "prejudice wholly disproportionate" to its logical relevance should be excluded. *State v. Rousan*, 961 S.W.2d 831,848 (Mo.banc1998). The question is whether the evidence tended "to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. U.S.*, 519 U.S. 172,180(1997).

Over repeated objections, the State elicited the following:

- Scott Pollard is married (Tr.1854). He and his wife have two children and three grandchildren. *Id.*
- Garry Seltzer is married (Tr.1918). He and his wife have two grown sons, ages 21 and 19. *Id.*
- Steven Salamon is married (Tr.1954). He and his wife have four children. *Id.*

Admitting this violated Ken's rights to due process, a fair trial before a fair/impartial jury, and freedom from cruel/unusual punishment.

Despite contemporaneous objections, counsel didn't include this error in Ken's motion for new trial (L.F.1030-1043). Consequently, this Court must review for plain error. Rule 30.20; §565.035.2. This Court has a statutory duty to review all errors raised on appeal, and the preservation rules are not intended to be a procedural trap. *State v. Pointer*, 887 S.W.2d 652,654(Mo.App.,W.D.1994); *State v. Tillman*, 938 S.W.2d

287(Mo.App.,W.D.1997); *State v. Taylor*, 929 S.W.2d 925(Mo.App.,S.D.1996). Preservation requirements insure that trial courts, in the first instance, have an opportunity to rule on a precise objection. *Pointer,supra*. It did, here. "The stakes in [capital cases] are too high for a game of legal 'gotcha' [to defeat this substantial error]." *Schneider v. Delo*, 85 F.3d 335,339(8th Cir.1996).

No Logical Relevance

Victim impact evidence is a "method of informing the sentencing authority" about the impact of the defendant's crime. *Payne v. Tennessee*, 501 U.S. 808,825(1991); *State v. Roberts*, 948 S.W.2d 577,604(Mo.banc1997). *Payne*, however, noted that there will be occasions when victim impact evidence is relevant to guilt. *Id.* at823. The familial details of Pollard, Seltzer and Salamon served absolutely no purpose in the guilt-phase of *Ken's* trial. They neither proved nor disproved any fact in issue. The State didn't elicit these details from any other witness as a way of introduction or to make them comfortable on the stand.

No Legal Relevance

The purpose of victim impact evidence at sentencing is to let the State "show the victims are individuals…and not simply 'faceless strangers.'" *Roberts*, 948 S.W.2d at604. Ironically, the State wanted Pollard, Seltzer and Salamon to remain faceless during voir dire. It strenuously objected when defense counsel tried to question the potential jurors whether they would be prejudiced knowing that Ken had "also shot

others" besides Mary. *See*PointVII,*supra*. The State wanted to spring the "others" onto the jurors—sort of like, 'just when you thought it couldn't get any worse…" This is analogous to situations like *State v. Weiss,* 24 S.W.3d 198 (Mo.App.,W.D.2000) and *State v. Luleff,* 729 S.W.2d 530,535 (Mo.App.,E.D.1987) where the State wins the exclusion of defense evidence and then comments in closing argument that such evidence is missing. *Accord State v. Hammonds,* 651 S.W.2d 537,538-539(Mo.App.,E.D.1983). Such conduct is manifestly unjust. *Weiss,supra* and *Hammonds,supra* (counsel failed to object); *Luleff,supra* (counsel omitted objection from new trial motion).

Whether Pollard, Seltzer and Salamon had families that loved them did nothing but lure the jury away from its task in guilt-phase and invite them to find Ken guilty of first-degree murder based on his "moral culpability and blameworthiness." Emotion has no place in a capital murder trial. *State v. Taylor,* 944 S.W.2d 925,938(Mo.banc1997). By overruling counsel's objections to this irrelevant evidence, the trial court gave its "stamp of approval" and increased the likelihood that the jury would be diverted from their task. *Taylor,* 944 S.W.2d at938. This Court should reverse Ken's convictions.

XIII.

The trial court abused its discretion in sustaining the State's hearsay objection and excluding RefusedExs.A,B from guilt because such rulings violated Ken's rights to due process, present a defense, a fair trial, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const., Art.I,§§10,18(a),21. RefusedExs.A,B were not hearsay. Counsel did not seek to use them to *prove* that Ken did *not* commit the acts of adult abuse that Mary had alleged or that the house on Deborah Street was Ken's separate property, but rather to rebut the State's case and to provide the jury evidence showing that Ken acted out of rage, not deliberation. Then, having won the exclusion of this evidence, the State thrice argued that the jury "*heard no evidence*" that Ken was so out-of-control he couldn't deliberate.

Ken's culpability hinged on the jury's assessment of his mental state. Defense counsel didn't dispute Ken's actions, only his deliberation (Tr.2009-2017;AppendixA63-A71). Since Ken's amnesia prevented a diminished capacity defense (Tr.2039-2040, 2159-2161;L.F.70), the only avenue for rebutting deliberation was through anecdotal evidence tending to show that Ken had acted out of rage. The trial court blocked that avenue.

As discussed in PointXII,*supra*, trial courts have broad discretion, but not unfettered, in deciding whether to admit evidence. *State v. Bernard*, 849 S.W.2d 10,13 (Mo.banc1993);*accord State v. Ray*, 945 S.W.2d 462,467(Mo.App.,W.D.1997). This

Court will affirm the trial court's ruling unless it abused its discretion and thereby caused prejudice. *Ray,supra* at469. But, error in a criminal case is presumed prejudicial, unless the facts and circumstances clearly show otherwise. *Id.*

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683,688(1986)(citation omitted);*accord*Mo.Const.,Art.I,§18(a). "[A]n opportunity to be heard" is essential to procedural fairness. *Crane,supra* at690. Ken had a "basic right to have the prosecutor's case encounter and 'survive the crucible of *meaningful adversarial testing.*" *Id.*at690-691. The trial court denied Ken that opportunity, violating his rights to due process, present a defense, a fair trial, and freedom from cruel/unusual punishment.

In *Crane*, "the entire defense was that there was no physical evidence to link him to the crime and that, for a variety of reasons, his [confession] was not to be believed." *Id.*at691. To support that defense, Crane tried "to paint a picture of a young, uneducated boy who was kept against his will in a small, windowless room for a protracted period of time until he confessed." *Id.* This proffered evidence "was all but indispensable to any chance of [Crane's defense] succeeding." *Id.* The court erred in excluding Crane's sole defense. *Id.*

Proffered evidence must tend to confirm or refute a fact in issue or to corroborate other relevant evidence. *Ray,supra*, at467. But it need only be relevant, *not conclusive. State v. Richardson*, 838 S.W.2d 122,124(Mo.App.,E.D.1992). Evidence that rebuts the mental state is admissible. *State v. Horst*, 729 S.W.2d 30,31(Mo.App.,E.D.1987). Intent

may be shown by evidence of, and inferences from, conduct before the charged offense. *Ray*,*supra* at468. This is precisely what defense counsel tried to do.

To rebut the notion of "cool reflection," defense counsel proffered RefusedExs. A,B (Tr.1898-1908). These two exhibits showed the anger brewing deep inside Ken, and, thus, they tended to refute deliberation—*the* fact in issue. These exhibits showed that Ken was enraged. He alleged that Mary had used "false and untrue accusations" of abuse (RefusedEx.A,paragraphs3,4;AppendixA80-A81) to "force[] [him] to be removed from his house" (RefusedEx.B,paragraph4;AppendixA83)—the house he had owned well-before their marriage (RefusedEx.B,paragraph3;AppendixA83). He alleged that Mary had forced him from the house so that she could damage the house and steal his belongings (RefusedEx.B,paragraphs5-7;AppendixA84). A reasonable juror could have found this to negate deliberative thought. After all, Mary loved the house: "That's the only thing [she] wanted out of the divorce. Was the house." (HammackTr.72). RefusedExs.A,B tended to show that Ken's rage prevented his cool reflection on anything.

The trial court sustained the State's hearsay objection and excluded these critical exhibits (Tr.1898-1908). Hearsay is an extrajudicial statement used to prove its truth, with its value resting upon the credibility of the out-of-court declarant. *State v. Harris*, 620 S.W.2d 349,355(Mo.banc1981). Defense counsel did not want to prove the truth of these exhibits; he wanted to disprove deliberation (Tr.1900). Nevertheless, the trial court first quizzed, "How does the State have an opportunity to cross-examine him on these

issues?" (Tr.1900), and later complained, "There is no way for the State to cross-examine him on that." (Tr.1904).

Of course, the State had presented evidence through Lisa that she and Mary remained in the house after Mary filed for divorce and Ken "moved out" (Tr.1716). Defendants must be permitted to explain the evidence against them. *Gardner v. Florida,* 430 U.S.349, 356-361(1977). Perhaps realizing this, the court opined that defense counsel could ask Pollard whether Mary had filed an adult abuse action, removing Ken from the house and "whether Mr. Baumruk responded to that, *yes or no*…." (Tr.1904-1905). But, the court insisted, "[Y]ou cannot, in my opinion, ask whether or not those filings challenge the allegations made by Mrs. Baumruk." (Tr.1905). Counsel could not even explain that Ken's responses were an effort to get back into his house (Tr.1908). This isn't "meaningful adversarial testing."

When counsel noted, "That leaves the jury with a reasonable inference that [Ken] just consented to it and that's not the picture at all," the court retorted, "that's the way it is" (Tr.1905), later, reiterating, "I can't help it. If he isn't going to take the witness stand so the State has the opportunity to cross-examine him, there is nothing I can do about it." (Tr.1906). The court maintained that the defense couldn't explain Ken's challenged to the adult abuse allegations "unless…the State has the opportunity to cross-examine him." (Tr.1907). The court's "problem" with RefusedExs.A,B was that they were "affidavit[s]"

(Tr.1907). If this was truly the court's concern, then redaction would have provided adequate protection. This "problem" was not a legitimate concern.[33]

The court abused its discretion. Its sole aim was to provide the State "the opportunity to cross-examine" Ken. A court cannot deny one constitutional right (the right to present a defense) as leverage to compel Ken to waive another (the right not to testify). *State v. Samuels*, 965 S.W.2d 913,920(Mo.App.,W.D.1998)(forcing a defendant to surrender one constitutional right in order to assert another is "intolerable").

In *Ray*, 945 S.W.2d at469, the trial court refused to let Ray introduce evidence "of the 'events' leading up to the shooting." The court "paralyzed" Ray's defense by foreclosing his opportunity to rebut the case with evidence explaining his behavior. *Id.* From Ray's evidence, the jury could have inferred that Ray's "pre-shooting state of mind did not include the requisite mental state." *Id.* at470. Letting the State "portray Ray as a cold-blooded killer" unencumbered by Ray's contrary evidence, required reversal. *Id*.at469-470.

Similarly, here, the trial court paralyzed Ken's only defense. Ken only contested deliberation. And, he couldn't contest that with a diminished capacity defense because of his amnesia. His only defense was that he was so enraged that he did not—*under the facts*—deliberate (Tr.2009-2017;AppendixA63-A71). As with the rejected evidence in *Crane*, RefusedExs.A,B were indispensable to Ken's defense. Unencumbered by Ken's

[33] Interestingly, Mary's petition for dissolution—**State**Ex.41—was also an affidavit (Tr.1855-1856,1896).

proffered evidence, the State presented a one-dimensional image of Ken as a cold-blooded killer—just as it did in *Ray*. It presented evidence that, during three prior dissolution hearings, Ken behaved "very agitated" and launched into Mary with "pretty filthy stuff" (Tr.1859-1860).

Crane,*supra*, concluded that this error is subject to harmless error review. The State, however, bears the weighty burden of proving harmlessness beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18,24(1967). It cannot do that here. After winning the exclusion of RefusedExs.A,B, the State twice,

- "In this case, I assume what [defense counsel is] trying to tell you, is this man over a year and a half got so angry that he was out of control. *But you heard no evidence of that*" (Tr.2018;AppendixA72);
- "He says his life is out of control, *yet there is no evidence of that*." *Id.*;
- "It doesn't mean that he doesn't cooly [sic] reflect, because *if there was that kind of evidence, you would have heard it. There was none of that*." (Tr.2021;AppendixA75).

(added);PointIX,*supra*. The jury didn't hear the evidence precisely because the State and the trial court blocked Ken from providing it. This error results in manifest injustice. *State v. Weiss*, 24 S.W.3d 198,202-204 (Mo.App.,W.D.2000)(State made "positive misrepresentations" that Weiss didn't have evidence that had been excluded based upon the State's objection thereto); *accordState v. Luleff*, 729 S.W.2d 530,535(Mo.App.,E.D. 1987);*State v. Hammonds*, 651 S.W.2d 537,538-539(Mo.App.,E.D.1983).

Excluding Ken's sole defense was not harmless beyond a reasonable doubt; thus, this Court must reverse his convictions and remand for a new trial.

XIV.

The trial court abused its discretion in sustaining the State's relevancy objection and unduly restricting counsel's cross-examination of Pollard regarding the conflict of interest because such ruling violated Ken's rights to due process, confrontation, present a defense, a fair trial, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. The State elicited from Pollard that he retrieved the file from Ken's previous divorce, felt "[t]otal shock" that he had represented Ken in that case, and that had he remembered representing Ken, he would not have accepted Mary's case. Since Ken shot Mary while Pollard was examining her about this conflict of interest, defense counsel wanted to confront the topic. As soon as counsel broached the conflict, however, the State objected that Pollard's conflict was irrelevant. Although counsel argued that a reasonable juror could infer that Ken was "incensed" that his former attorney was now working "on the other side" and thus anything Ken had told Pollard was now available to Mary. Precluding this inquiry prejudiced Ken in that it withheld evidence tending to refute deliberation.

Those involved in *In re: the Marriage of Mary Baumruk v. Kenneth Baumruk*, arrived at the St.Louis County Courthouse, expecting a resolution to that protracted litigation. But the dissolution had to wait. Pollard, Mary's attorney, arrived with a shocking revelation: the case was fundamentally flawed because of a conflict of interest—he had previously represented Ken in Ken's first dissolution (Tr.1873-1874;

L.F.56-57). Pollard informed his current client—Mary, next he told Ken's current attorney—Seltzer, then both attorneys told Judge Hais, who became "perturbed" (Tr.1873-1874,1891). Finally, Seltzer took Ken aside and told him (Tr.1700,1893).

Defense counsel tried to confront Pollard with this conflict to show that it had "incensed" Ken and that *it* had been the straw that broke Ken's back (Tr.1887-1889). It is true that Ken came to the Courthouse with two guns in his briefcase. But, he had evidence that negated the notion that he had done so, having coolly reflected and deciding to kill Mary. The court simply protected the State from that crucible. It also protected the State from this crucible, declaring that this subject was irrelevant. This evidence refuted *the* fact in dispute—i.e., it tended to show that Ken did not act deliberately. Excluding it, perverted the adversarial system and violated Ken's rights to due process, confrontation, present a defense, a fair trial, and freedom from cruel/unusual punishment..

"The fundamental purpose of a criminal trial is the *fair ascertainment of the truth*." *State v. Carter*, 641 S.W.2d 54,58(Mo.banc1982)(added). Cross-examination is the "greatest legal engine ever invented for the discovery of truth." *Kentucky v. Stincer*, 482 U.S. 730,739(1987) and *State v. Schaal*, 806 S.W.2d 659,663 (Mo.banc1991). It is "[o]ne of the fundamental guarantees of life and liberty." *Pointer v. Texas*, 380 U.S. 400,404(1965). It is not an empty promise. The Confrontation Clause guarantees criminal defendants the opportunity to conduct *effective* cross-examination of adverse witnesses. *Stincer*,*supra*. When that opportunity is denied, the system's integrity is lost. *Id*.at739(describing confrontation as "critical for ensuring the integrity of the factfinding

process:); *Pointer*, 380 U.S.at404(describing confrontation as "an essential and fundamental" for ascertaining the truth).

Complementing this right to confrontation is the "meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683,688(1986)(citation omitted)(added). As fully discussed in PointXIII,*supra*, Ken had a "basic right to have the prosecutor's case encounter and survive the crucible of *meaningful adversarial testing*." *Id.*at690-691(citation omitted)(added). For example, Crane's "entire defense" depending on his being able "to paint a picture of a young, uneducated boy who was kept against his will in a small, windowless room for a protracted period of time until he confessed…was all but indispensable to any chance of [Crane's defense] succeeding." *Id.* And the court erred in excluding that picture.

Similarly, Ken's "entire defense" hinged on his ability to paint a picture of a man whose rage and distrust prevented him from deliberating (Tr.2009-2017;AppendixA63-A71).

> Fidelity to one's client is sacrosanct. We are our clients' confidants.
>
> It is the glory of the legal profession that its fidelity to its clients can be depended upon; that a man may safely go to a lawyer and converse with him upon his legal rights in litigation with absolute assurance that that lawyer's tongue is tied from ever discussing it.

People v. Curry, 272 N.E.2d 669,672(Ill.App.4 Dist.1971)(citations omitted). When former confidants become current adversaries, all is lost.

Defense counsel needed to confront Pollard with this conflict. Incredibly, the court adopted the State's complaint that such confrontation sought to show the Pollard did something improper by impeaching him with "some sort of prior bad act" (Tr.1888). Ken's defense did not hinge on whether Pollard had acted improperly in representing Mary. Rather, it hinged on whether Pollard may have gotten information while representing Ken that could harm Ken now.

"[A] counselor at law is enjoined to probe deeply for all the facts, favorable and unfavorable, before counseling a particular course for his client." *Arkansas v. Dean Foods Products Co.*, 605 F.2d 380,385(8th Cir.1979). The fact of that Ken and Pollard had an attorney-client relationship raises an "*irrefutable presumption*" that Ken disclosed confidences to Pollard. *Id.*at384(added). Factually, Ken needed to confront Pollard with this in order to paint the picture for his defense. The trial court abused its discretion in refusing to let Ken explain the State's evidence. *See Gardner v. Florida*, 430 U.S.349,356-361(1977).

This error is not harmless. The court let the State present its spin on Pollard's conflict (Tr.1865-1866,1870-1874). Indeed, by portraying Pollard as being in "total shock" to see that he had represented Ken, the State got to present a one-dimensional image of the conflict. *State v. Ray*, 945 S.W.2d 462,469-470(Mo.App.,W.D.1997) (Letting the State "portray Ray as a cold-blooded killer" unencumbered by Ray's contrary evidence, required reversal for a new trial.). This Court should reverse Ken's convictions and remand for a new trial.

XV.

The trial court abused its discretion in admitting Ex.8, over repeated objections that this audiotape of the murder caused undue prejudice, because such rulings violated Ken's rights to due process, a fair trial before a fair/impartial jury and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. While trying Ken at the murder scene, the State put the jurors in the middle of the shooting-spree. The prejudicial impact of twice playing Ex.8 far outweighed whatever tendency it had to prove a fact in issue. The tape lured the jurors' attention away from Ken's disputed mental state and invited them, as quasi-witnesses, to find him guilty based upon the "raw emotion."

There is no question that Ken shot Mary, Pollard and Seltzer inside the St.Louis County Courthouse. Pollard and Seltzer both said so (Tr.1877-1882,1929-1935), as did Sandy Woolbright, Greg Luber, Lisa Bakker, (Tr.1677-1680,1705-1708,1723-1725). Furthermore, they each testified with "raw emotion" about what they saw (Tr.1998,2006-2007,2239;AppendixA52,A60-A61,A105). The State lacked nothing. It even had the jury sitting inside the St.Louis County Courthouse. Yet, it wanted more. It wanted to put the jurors *in* the murder scene, and it accomplished that by twice playing Ex.8—the audiotape of Mary, Pollard and Seltzer being shot. This served no purpose but to inflame the jurors, and counsel repeatedly objected (Tr.1401-1403,1633-1634,1656-1657,1675-1676,2008;L.F.1038).

As fully discussed in PointXII,*supra*, trial courts have broad, but not unfettered, discretion in deciding whether to admit evidence. *State v. Bernard*, 849 S.W.2d 10,13 (Mo.banc1993). Evidence must be relevant to a fact in issue. *Id.* Before admitting this evidence, the trial court first had to decide whether the audiotape was logically relevant -- i.e., did they tend to prove or disprove *a fact in issue*? *State v. Rousan*, 961 S.W.2d 831,848(Mo.banc1998).

The State had five witnesses testifying that Ken fired five shots inside the courtroom, shooting Mary, Pollard and Seltzer. The tape added nothing but prejudice. This is akin to the error condemned by *State v. Floyd*, 360 S.W.2d 630,631(Mo.1962). There, the coroner identified a crime scene photograph, noting that the "body was too badly decomposed" to determine the cause of death. *Id.*at631-632. Since "eight or nine" witnesses had already described the location of the body, the "manifestly inflammatory" nature of the photograph outweighed its minimal probative value. *Id.*at631-633. This Court reversed Floyd's convictions. *Id.*at633. Similarly, the "manifestly inflammatory" nature of the audiotape far outweighed its probative value.

The audiotape doesn't prove any fact *in issue*. It proves that a dissolution hearing got underway, that Pollard examined Mary about his conflict of interest and that shots were then fired, followed by a fair degree of chaos (Ex.8). But it proves nothing about *Ken's* mental state--the *only* fact in issue. At best, it tends to prove the *corpus delicti*. Having some logical relevance, however, doesn't make evidence admissible. *Rousan*, 961 S.W.2d at848. Here, the *corpus delicti* was not disputed, and it cannot provide the basis for admitting this inflammatory evidence. Since the fact is undisputed, then

tendency of evidence to prove that fact is far outweighed by its tendency to inflame the passions and prejudices of the jury. *Bernard*, 849 S.W.2d at17 (uncharged crimes are only admissible to prove identity when "the identity of the wrongdoer *is at issue*.") (added); *State v. Conley*, 873 S.W.2d 233,237(Mo.banc1994)("In order for intent or absence of mistake or accident to serve as the basis for admission of evidence of similar uncharged crimes, it is necessary that those be *legitimate issues* in the case.")(added); *State v. Revelle*, 957 S.W.2d 428,438(Mo.App.,S.D.1997)(en banc) (hearsay of victim's state-of-mind is admissible "provided the [victim's] state of mind *is an issue* in the case.")(added).

If evidence diverts the jurors' attention away from their task or if it causes "prejudice wholly disproportionate" to its logical relevance, it should be excluded. *Rousan*, 961 S.W.2d at848. The question is whether the audiotape tended "to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. U.S.*, 519 U.S. 172,180(1997). Ex.8 did. With prodding from the State, Ex.8 lured the jurors to declare guilt based upon the "raw emotion" of having to witness the shootings. This violated Ken's rights to due process, a fair trial before a fair/impartial jury and freedom from cruel/unusual punishment.

This is remarkably similar to the situation condemned by the Illinois Supreme Court in *People v. Blue*, 724 N.E.2d 920(Ill.2000). There, prosecutors also "coerced the jury into returning a verdict more likely grounded in sympathy than on a dispassionate evaluation of the facts." *Id.*at931. To win Blue's first-degree murder conviction and death sentence, the State used the victim's "bloodied and brain-splattered uniform." *Id.*

at922,931. The Illinois Supreme Court agreed that the uniform could tend to establish the nature and location of one of the fatal wounds. *Id.*at934. It's "evidentiary value," however, "was minimal." *Id.*at934. The *Blue* Court noted that the State had brought the "the actual remnants of the scene itself" to the jurors. *Id.* This tactic was "aimed directly at the sympathies, or outrage, of the jury." *Id.* Blue's conviction had to be reversed. *Id*.

Here, the State had already won the right to seat the jury in the halls of the murder. By playing the tape in that setting, the State plucked the jury from its box and dropped them in the midst of the gunfire—not once, but twice (Tr.1675-1676,1687, 2008). To insure that the jurors experienced the gunfire, the State told them that one of the bullets had whizzed over the jury box, embedding itself in the wall (Tr.1831). The State took direct aim at the jurors' sympathies and outrage. Indeed, it repeatedly reminded the jurors of the "raw emotion" they saw from the witnesses to the shootings (Tr.1998,*accord*Tr.2006-2007,2239).

Admission of evidence can, sometimes, be harmless. But the State must prove it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18,24 (1967). It cannot do so, here, because it cannot show beyond a reasonable doubt that the jury did not consider or could not have been influenced by these "manifestly inflammatory" tape. *State v. Alexander*, 875 S.W.2d 924,929(Mo.App.,S.D.1994). Over renewed objection, it replayed the tape during its closing argument in guilt phase (Tr.2008). The jury could not disregard Ex.8.

Even if this Court finds that Ex.8 was harmless as to Ken's guilt, it cannot do so as to his death sentence. Death is different. *Woodson v. N.C.*, 428 U.S. 280,305(1977).

That difference requires heightened reliability that death is the appropriate punishment. *Id.* It is essential to Ken and to society that his death sentences "be, and appear to be" based on reason and not emotion. *Gardner v. Florida,* 430 U.S. 349,358(1977); *Booth v. Maryland*, 482 U.S. 496,508(1987). Here, the State created the opposite appearance with its repeated references to the "raw emotion" of the case.

The U.S. Supreme Court granted *certiorari* in *Thompson v. Oklahoma,* 487 U.S. 815, 820-821(1988) to decide whether vulgar photographs rendered Thompson's death sentence unreliable because of their emotional impact. The Court, however, reversed that sentence on other grounds, leaving this question unanswered. *Id*.at838,n.48. The emotional value of Ex.8 raises similar concerns that cannot be dismissed as harmless. It improperly invited the jury to impose death because of its outrage and sympathy. *Zant v. Stephens*, 462 U.S. 862 885 (1983). This Court should reverse Ken's conviction and sentence and remand for a new trial.

XVI.

The trial court erred in refusing Instruction No. A because such ruling violated Ken's rights to due process, present a defense, and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I, §§10, 18(a),21. Paragraph 2 of Instruction A submitted that Ken was "under the influence of extreme mental or emotional disturbance" at the time of the murder. Counsel presented evidence that Ken had suffered a series of stressors in the months and years leading up to the murder. Given the cumulative effect of stress, Dr. Cuneo described Ken's stressors as "indicators of suicide."

Beginning in 1988, Ken endured a series of stressors (Tr.2161). Each new stressor built on the one before it, accumulating into extreme reaction (Tr.2160-2161). It built-up to crisis proportions, becoming "indicators of suicide" (Tr.2161). The trial court rejected this out-of-hand, refusing to instruct the jury that it could consider, "Whether the murder of Mary Baumruk was committed while the defendant was under the influence of extreme mental or emotional disturbance." (L.F.1028,1040;Tr.2227-2228;Appendix A99).

The court must instruct the jury on all statutory mitigating circumstances supported by the evidence. *Lockett v. Ohio*, 438 U.S. 586,604 (1978). Here, the trial court refused to do so, violating Ken's rights to due process, present a defense, and freedom from cruel/unusual punishment. Its error is presumed prejudicial "unless the

contrary is clearly shown." *State v. White*, 622 S.W.2d 939,943 (Mo.banc1982). The State must show that no prejudice resulted. It cannot.

The trial court had ample evidence supporting the "extreme mental or emotional disturbance" mitigator: In 1988, Ken's aunt Emma died (Tr.2161;Hammack Tr.99). His uncle John died "shortly after." *Id.* Aunt Emma was Ken's mother's sister, and John was Ken's father's brother—i.e., sisters married brothers (Hammack Tr.93). The two couples lived next door to one another (Tr.2160;HammackTr.94). "The houses were connected with a cellar, and the two families actually lived like a single family unit. *Id.*

In August 1990, Ken's mother died (Tr.2160;HammackTr.99-100). Ken "carried [her] ashes with him" for several months (Tr.2160; HammackTr.100). Also, in August 1990, Mary hired Pollard and filed for divorce (Tr.1857; HammackTr.100-101;Supp L.F.14-16). Though the house in which Ken and Mary had lived was Ken's before their marriage, Mary obtained an *ex parte* order, evicting him from his home (L.F.58-60;Ex.8; Tr.1716,1900,1909). Ken couldn't bear losing "his family home." (Tr.1815). He adamantly contested his *ex parte* eviction, alleging that Mary used "false and untrue accusations" to have him evicted (Refused Exs.A,B;AppendixA80-A92). Moments before the murder, Ken's attorney told him that Pollard had just revealed that he had represented Ken about 15 years earlier (Tr.1700,1874,1893).

This amply supports the "extreme mental or emotional disturbance." The State's complaint that Ken needed "direct evidence" before he can get this instruction is illogical (Tr.2226-2227). If the State's complaint was that Ken needed an expert to diagnose that he was acting "under the influence of extreme mental or emotional disturbance," it's just

plain wrong. This complaint may affect what weight the jury would give to the evidence, but it doesn't affect Ken's right to have the jury consider it.

In *State v. Nunn*, 646 S.W.2d 55,58-59(Mo.banc1983), this Court reversed a first-degree assault conviction because the court hadn't properly instructed the jury that "extreme emotional disturbance" mitigated Nunn's actions. Nunn had no defense to the assault; his only hope was mitigating it. *Id.*at58. Conveniently, Nunn's only evidence supporting this mitigating factor came *from Nunn, himself*. *Id.*at56. Nevertheless, the court submitted it within the State's first-degree assault verdict director. *Id.*at57. This told the jury that, to find Nunn guilty, it couldn't find that he had acted "under the influence of extreme emotional disturbance." *Id.*at57. Submitting Nunn's defense in the negative, however, was insufficient. This Court reversed for a new trial because Nunn was entitled to have this mitigating factor "written with an affirmative cast, emphasizing [his] theory of mitigation." *Id.*at58. Only by submitting it in that manner could the court equalize the position of the parties "in the eyes of the jury." *Id.*

Ken had much stronger evidence. Unlike Nunn, Ken didn't testify. Instead, he offered anecdotal, documentary and expert evidence. Dr. Cuneo testified about the "indicators of suicide" in Ken's life (Tr.2160-2161); *cf. Kenley v. Armontrout*, 937 F.2d 1298,1308 (8thCir.1991)(evidence didn't diagnose a mental disease/defect, but showed "an extreme personality or emotional disorder or disturbance").

> Given that the imposition of death by public authority is so profoundly different from all other penalties,…an individualized decision is essential in capital cases.

The need for treating each [capital] defendant…with that degree of respect due the uniqueness of the individual is *far more important than in noncapital cases*.

Lockett, 438 U.S.at605(added). In *Nunn*, this Court held a proper mitigating instruction "would have benefited defendant by lending additional dignity and importance to the issue of mitigation." *Nunn*, 646 S.W.2d at58. No where is "additional dignity" more necessary than in the penalty-phase of a capital trial.

In *Chesire v. State*, 568 So.2d 908,911(Fla.1990), the defense offered no evidence. From the State's case, however, reasonable jurors could have found that Chesire acted under extreme emotional distress.[34] From the State's evidence, however, the murders "could be characterized as the tragic result of a longstanding lovers' quarrel…" and Cheshire's belief that his wife was encouraging their son to call her lover "Daddy." *Id.* "Events that result in a person succumbing to the passions and frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." *Id.*at912. The trial court had rejected this evidence "out-of-hand," without considering whether a reasonable juror could believe the evidence. The Florida Supreme Court reversed. *Id.*at913.

Like, Cheshire's trial court, Ken's dismissed the evidence supporting this mitigating factor "out-of-hand." Here, the steady stream of stressors became a raging river, and it is no answer for the trial court to note its disbelief. There was ample

[34] "Florida's analogue to Missouri's 'extreme mental or emotional disturbance' mitigating factor." *State v. Knese*, 985 S.W.2d 759,778(Mo.banc1999).

evidence that Ken acted under the influence of extreme mental or emotional disturbance. This Court should reverse and remand for a sentencing retrial.

XVII.

The trial court plainly erred, resulting in manifest injustice, in giving Instruction No. 14 because it violated Ken's rights to due process and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VIII,XIV; Mo.Const.,Art.I, §§10,21. This instruction delineates ten aggravators, which, in reality, repeat one aggravator circumstance ten times. Such duplication does not narrow the class of defendants subject to execution, but gives the State an unfair advantage. The State told jurors to impose death because Instruction No. 14 is the "longest" instruction—"It's four pages long."

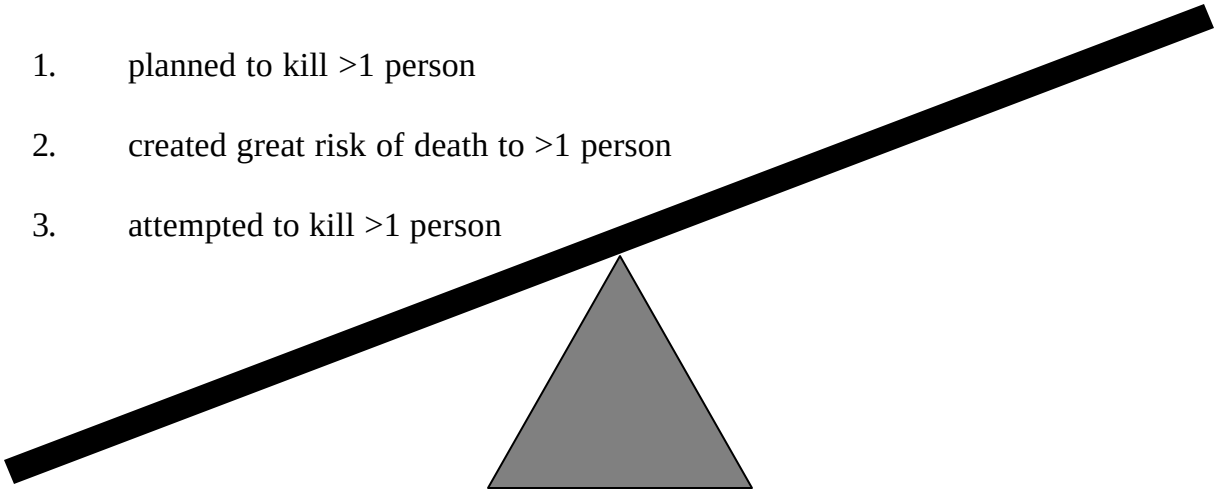
The State's evidence showed that Ken went to the St.Louis County Courthouse and shot-up-the-place. The State argued,

> You are dealing with a man, when he came into this courthouse, a public building in St.Louis County, a building where citizens come to have their disputes settled in a law-abiding way, where citizens come for justice, whether it be a criminal case or a civil case, and *he came prepared for battle to kill as many as he could possibly kill. That is what we are talking about and* ***for that crime*** *the appropriate punishment is death*.

(Tr.2235)(added). Still, it took the jury nearly five hours to recommend death (Tr.2264-2267). What tipped the scales? The State won many unfair advantages, not the least of which was getting to transform "that crime" into ten aggravators. Statutory aggravators usually serve the "constitutionally necessary function" of narrowing the class of death-

eligible defendants. *Zant v. Stephens*, 462 U.S. 862,878(1983). Simply restating one aggravating circumstance ten times, however, doesn't serve that purpose. It simply served to tip the balance in the State's favor:

1. planned to kill >1 person
2. created great risk of death to >1 person
3. attempted to kill >1 person



(L.F.1015-1020;AppendixA93-A98). The State asked the jury to let it exercise its authority to impose death because the aggravating circumstance instruction "was the longest." (Tr.2236). Yes, it was—it was 400% longer than Ken's mitigating circumstance instruction (*Compare* L.F.1015-1020,1022-1023). The decision to impose death cannot be as arbitrary as this.

Trial counsel didn't object to the State's use of wholly duplicative aggravators. This Court, however, must review the "punishment as well as *any errors enumerated by way of appeal*." §565.035.2, RSMo1986(added). Indeed, "the severity of the sentence mandates careful scrutiny in the review of *any colorable claim* of error." *Zant,* 462 U.S. at885(added). The trial court's plain error in giving Instruction No. 14 deserves careful

scrutiny, as manifest injustice will otherwise result. Rule 30.20. It violated Ken's rights to due process and freedom from cruel/unusual punishment.

This Court has consistently rejected arguments that statutory aggravators were unduly duplicative. *State v. Ringo*, 30 S.W.3d 811,824(Mo.banc2000)(citations omitted). *Ringo*'s conclusion, notwithstanding, there is no requirement that "the court shall instruct the jury of any of the statutory aggravating circumstances established by the evidence beyond a reasonable doubt." *Id*. Section 565.032.2 certainly doesn't require that. It lists 17 statutory aggravating circumstances, but only requires that the judge "include in his instructions to the jury for it to consider…whether a statutory aggravating circumstance or circumstances…is established…beyond a reasonable doubt." This hardly demonstrates a legislative intent to instruct on *every* statutory aggravator even those totally subsumed by another. *E.g., Servin v. State*, 32 P.3d 1277(Nev.2001).

The Nevada legislature has created aggravators for both burglary and a home invasion. *Id.* Servin's trial court instructed the jury on both, and Servin argued that they were unduly duplicative. *Id.* Identical conduct underlay both. The Nevada Supreme Court found no "separate interests" advanced by letting the State submit both aggravators against Servin. *Id.* Since the burglary and home invasion aggravators relied on the same conduct by Servin, the trial court erred in submitting both. *Id.;accord Manley v. State*, 979 P.3d 703 (Nev.1999)(based on identical facts, the robbery and "receiving money" aggravators were duplicative);*Cook v. State*, 369 So.2d 1251,1256(Ala.1978)(submitting both murder during a robbery and murder for pecuniary gain unconstitutionally "condemn[ed] Cook twice for the same culpable act…"); *Provence v. State*, 337 So.2d

783,786(Fla.1976) (murder during a robbery and murder for pecuniary gain unconstitutionally "refer to the same aspect of the…crime").

This Court should adopt this analysis. *Ringo*, 30 S.W.3d at824, concluded that nothing in *U.S. v. Farrow*, 198 F.3d 179(6th Cir.1999); *Willie v. State*, 585 So.2d 660 (Miss.1991); or *Engberg v. Meyer*, 820 P.2d 70(Wyo.1991) justified departure from this Court's precedent. *Id. Servin* does. There is no "separate interest" advanced by submitting the same culpable aspect of Ken's crime as ten aggravators. *The crime* for which the State sought death was that Ken "came prepared for battle to kill as many as he could possibly kill." (Tr.2235). There are no interests separate from "that crime." The depravity of mind aggravator, the risk of death to more than one person aggravator, and the attempted murder of more than one person aggravators all arise from identical facts and serve the same interest (L.F.1015-1020). The trial court plainly erred in letting the State rephrase "that crime" ten times.

Deciding whether to kill a man isn't a numbers-game. *State v. Storey*, 986 S.W.2d 462,464(Mo.banc1999). "The evaluation of the aggravating and the mitigating evidence offered during the penalty-phase is more complicated than [determining] which side prove[d] the most statutory factors…." *Id*. Where our Legislature has had a "separate interest" in punishing the same conduct twice, it has done so. *E.g.*, ACA,§571.015. It hasn't done so with the aggravating circumstances. It has simply listed all possible statutory aggravators and told trial courts to determine whether a statutory aggravator exists.

This Court has repeatedly held that Missouri doesn't weigh aggravators and mitigators to determine punishment. *Ringo,supra.* Indeed, this Court "has stated repeatedly that only one valid aggravating circumstance need exist." *State v. Brooks*, 960 S.W.2d 479,497 (Mo.banc1997). Certainly, only one aggravator is needed to make a defendant death-*eligible*. But, if that proves that Missouri doesn't weigh its aggravators and mitigators, then it necessarily follows that no "separate interest" is advanced by submitting duplicative aggravators.

Moreover, this Court's repeated statements, notwithstanding, this Court's instructions require the jury to determine whether the mitigating evidence "***outweigh[s]***" the aggravating. §565.032.1(3)(added);*accord*MAI-CR3d313.44A;(L.F.1022). The Legislature clearly intended that the jury *weigh* the aggravators against the mitigators. *See Antwine v. Delo*, 54 F.3d 1357,1368(8thCir.1995)("Since the jury found only two aggravating circumstances, the *balance* of aggravating and mitigating circumstances in the penalty-phase of the trial would have altered enough to create a reasonable probability that the jury would not sentence Antwine to death.").

By submitting single circumstance of "that crime" as ten separate aggravators, the court gave the State an unfair advantage. Indeed, the prosecutor emphasized that Instruction No.14, submitting those aggravators, "was the longest" instruction the jury received, as if that were reason enough to kill Ken. This Court should reverse Ken's death sentence and remand for a sentencing retrial otherwise manifest injustice will result.

Conclusion

This trial did not produce a fair ascertainment of the truth, thus Kenneth Baumruk respectfully requests the following relief:

Discharge:	PointV,VII
New Trial:	PointsI,II,III,IV,VI,VIII,IX,XI,XIII,XIV,XV
New Penalty-Phase:	PointsIX,X,XII,XVI,XVII

Respectfully Submitted,

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Certificate of Compliance and Service

I, Gary E. Brotherton, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office2000, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains **30,242** words; however, counsel is aware that MS Word did not count **183** words. Thus, the brief contains **30,425 words**, which does not exceed the 31,000 words allowed for an appellant's brief.
- ✓ The floppy disks filed with this brief contains a copy of this brief. They have been scanned for viruses using a McAfee VirusScan program, which was updated February 24, 2002, According to that program, this disk is virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy thereof were hand delivered, on the **4th** day of March 2002, to the Office of the Attorney General, Supreme Court Building, Jefferson City, Missouri 65101.

_____

Gary E. Brotherton